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A BAD OPINION IN REGARD TO CONSIDERATIONS WHICH MAY GIVE RISE TO THE RIGHT TO RESCIND A CONTRACT.

In the case of State v. Douglas (Mo.), which we find reported in 83 S. W. Rep. 90, there is, at the conclusion, a *per curiam* opinion as follows: "It is stated in the opinion of Metropolitan Land Company v. Manning, 98 Mo. App. 259, 71 S. W. Rep. 696, that state and county taxes become due in this state on the first day of September. That statement was based upon the briefs of opposing counsel. It was so stated by the land company and acquiesced in by each of the briefs for Manning, including the motion for rehearing, the contention of Manning being that a forfeiture did not occur until the time when penalties for nonpayment would attach, viz., the first day of January. It seems that in fact the statute does not in express terms name September 1st or any other day as a fixed time when taxes are due and payable. The several provisions of the statutes show that when the tax books are to be turned over to the collectors by the county clerks would be, if not the first of September, at least in the early part of that month. The error of counsel of the respective parties upon which the erroneous statement was based, in no wise affects the conclusion of the court since the taxes were not paid by Manning until near the middle of November. It is referred to now in order to correct the statement." We found upon examining the case of Metropolitan Land Co. v. Manning, 98 Mo. 248, 251 in the brief of respondent the following: "The covenant to pay taxes when due and payable, means that taxes are to be paid before penalties are incurred for nonpayment and before they become a burden upon the lessor, and the breach of this covenant occurs when the taxes are paid by covenantee and not before."

This seems very suggestive to us, and the reason given by the *per curiam* opinion, *supra*, that, "state and county taxes become due on the first day of September," was because it was "asserted by the land company and acquiesced by the briefs of Manning including the petition for rehearing," shows that the complaint made so frequently by attorneys that some of the courts of Missouri frequently seem to pay very little, if any, attention to their briefs, has good foundation in the above case; to say the least, it was rather a bad fling. But the right to declare a forfeiture in the case of Metropolitan Land Co. v. Manning, *supra*, was based upon this remarkable declaration that "county and state taxes become due and payable the first day of September." Then the court tries in this same *per curiam* opinion to clear its skirts, by the statement that, "the error of counsel of the respective parties upon which the court's erroneous statement was based in no wise affects the conclusion of the court, since the taxes were not paid by Manning until near the middle of November." The *per curiam* opinion then says: "It is referred to now in order to correct the statement." There is one thing sure, it is a good thing to correct a bad statement of law at any time, but it is a very bad time to do it when the rights of litigants may not be restored. If anything is plain, the court determined the Manning case on the ground that the taxes having become due on the 1st of September and were not paid till near the middle of November, such delay was an unreasonable one in an agreement "to pay taxes promptly when they became due and payable." But to blame the attorneys for such an error when their brief gives authority for the position that "taxes become due and payable when penalties are incurred for nonpayment and before they become a burden on the lessor," comes close to the limit. Yet all this stands out in bold relief in the reports.

The following is the basis of the opinion in the Manning Case, 98 Mo. App. 258: "The provision in respect to taxes was that defendant would pay all general taxes 'promptly when they become due and payable.' The state and county taxes became due and payable on September 1st, 1901, and were not paid till November 12th thereafter. Was this 'prompt' when they became due and payable? We think it was not. All the words of a contract, as of a statute, should be allowed some office to perform, if it can be reasonably done. The word 'promptly' was meant to emphasize that

the taxes were to be paid as soon as they became due. It was said in Butler v. Manney, 52 Mo. 497,506, that where in a lease, no time was fixed for the payment of taxes, 'that they will be paid as they become due.' Whether by that expression the supreme court meant within a reasonable time, does not appear. But certain it is, that the word 'promptly,' as used by these parties, means something more definite and covers a shorter time than a reasonable time. Words denoting that quick action was intended have received judicial interpretation. Thus an English statute required that 'immediately after' certain trials, application should be made for certificate, etc. On the conclusion of the trial the judge adjourned court to his lodgings and there, within fifteen minutes, granted the certificate. This was held to be sufficient. The statute with a little more breadth than the literal meaning would be, instantaneously, which would be perhaps impossible; but yet it is clearly seen from the opinion that there must be no delay." After citing several more cases the court concludes: "We are, therefore, satisfied that the defendant's covenant to pay the taxes 'promptly when the same became due and payable' can not be extended into, or interpreted to mean, within a reasonable time after due. While we will not attempt to say what limit of time the word 'promptly' will include in reference to making payment, yet we do not understand it to include the, perhaps, impossible, or the unreasonable, as that the payment should be made the instant it becomes payable. But while that is true, it ought not, on the other hand, to be contended that such word would permit of a delay stretching out into weeks, as in this case. The word was introduced into the contract so as to make it obligatory on the part of the covenentor to make no delay in payment of the taxes after they were payable, and that he should proceed to adjust them at once."

Taxes are regarded as having been paid promptly, if paid before a penalty is attached, and in this case they were paid a month and a half before the time for a penalty to attach. No extra burden had attached to the property when payment was made. It seems reasonable to conclude that it was not necessary for a dead person to arise from the grave and say that "such payment was prompt." The word "promptly" could have no other significance in the lease in question than to prevent the extra burden which would come from the failure to pay before the 1st of January, when a penalty attached. It certainly could make no difference to the lessor whether the taxes were paid in September or the last day of December. Contracts must be reasonably interpreted, and to hold, as was held in the Manning case, that every immaterial variation from the terms of a contract will invalidate it, is contrary to every rule for determining whether there had been a breach such as would give the right to rescind. There is not a particle of evidence that Manning evinced an intention not to be further bound by the terms of his lease, the very criterion by which to determine such a question. There is not a scintilla of evidence that he refused to be bound by the agreement to pay the taxes. It has frequently been held that the mere failure to pay for an installment when it became due was not of itself such a breach of a contract as to allow a rescission. Withers v. Reynolds, 2 B. & Ad. 882; Mersey Steel & Iron Co. v. Naylor, 9 App. Cas. 442; Johnston v. Milling, L. R. 16 Q. B. Div. 460; Palm v. Ohio & M. R. Co., 18 Ill. 217. In the Manning case there was not only no failure, but an actual compliance with the agreement.

The opinion in this case is the most superficial expression we have come across on the subject. If it is logically applied to other contracts, the right to rescind a contract will have been extended into a domain not dreamed of in the philosophy of the law any where else than in Missouri. It would appear on the face of the report of the case that the land company was seeking any kind of a pretext to oust Manning from an estate in the property represented by the lease; that Manning had resented it by going beyond the bounds by compelling a lease on the same terms from the land company as were set forth in the original lease. The question before the court was, did Manning so conduct himself as to evince an intention not to be bound by the terms of the contract? To say that the failure to pay taxes before the 12th day of November upon a covenant "to pay taxes promptly when they came due and payable," is not to comply with such a covenant, when no penalty could arise till over a month and a

half later, is to give expression to a novel consideration in determining whether or not a contract has been wholly abandoned and can not be supported either upon common sense or judicial expression. A thorough understanding of the maxim *de minimis non curat lex* would have been a great help to the Kansas City Court of Appeals in the above case. The many bad decisions which are accumulating over the country show the importance of getting back to fundamental principles, and they are a better guide to the accomplishment of justice than the case law which is flooding the land with such error as is disclosed in the principal case.

NOTES OF IMPORTANT DECISIONS.

HOMICIDE—ERROR TO EXCLUDE MATTERS OCCURRING PRIOR TO THE KILLING AND AT THE TIME THEREOF.—In the case of Moseley v. State (Miss.), 41 So. Rep. 384, an interesting point was decided in a case where the defendant set up self defense, and there was evidence to show violent conduct on the part of the decedent directed at defendant at a certain house, and that accused left there, and was followed by defendant, who made a deadly demonstration at the time of the killing. The court gave the following instruction: "The court instructs the jury that if you believe from the evidence beyond a reasonable doubt that Moseley willfully and deliberately shot and killed Alf Williams, and that at the time of the shooting Alf had done nothing to Moseley but curse and swear at him, and had been guilty of no act or conduct which was reasonably calculated to have aroused the fears or apprehension of Moseley for his own life or person at the hands of Alf, then Moseley is guilty of murder, and the jury should so find, however much afraid they may believe Moseley was of Alf, or however much reason they may believe Moseley might have had for such fears, or apprehensions on account of Alf's conduct previous to the time of the killing."

Among other things, Mr. Justice Calhoon said in reversing the case: "The fierce and violent conduct of the deceased at the house of Harriet Taylor, especially directed at the accused and with no sort of provocation; the fact that the accused left there and went to his storehouse, which was also his home, in order to avoid trouble with the deceased; the fact that the deceased followed him; and the fact of the hostile and deadly significance of the demonstration of the deceased towards the accused at the very time of the killing—all as testified to on behalf of the accused, made it error to give the sixth instruction for the state. The concluding sentence of it excludes consideration by the jury of all that occurred at Harriet Taylor's just preceding the killing, and, in truth, of the actions at the store. It is not possible for a jury to put itself in the place of the accused, and feel as he did, without a view of these matters; occurrences too closely interwoven to allow of separation in determining whether or not the accused shot in self-defense from the lights before him. We adopt the conclusion of those authorities which hold that testimony is admissible of the character of the deceased when under the influence of cocaine. A man may be peaceable and quiet when sober, but a terror when affected by cocaine. There was testimony offered to show this, and it is shown that defendant knew his character, and there is testimony sufficiently tending to show that deceased was under the influence of the stimulant to give Moseley the right to such testimony of character. We agree with the trial court, however, that particular instances of violence in other cases are not admissible." See Vol. 26, Cent. Digest, Homicide, Sec. 391-395, for cases in point.

HOMESTEAD—WHEN RIGHTS NOT LOST TO WIDOW BY SALE OF PROPERTY WHICH WAS AFTERWARDS REPURCHASED.—In the case of Smith v. Ferry (Wash.), 86 Pac. Rep. 658, it appears that after the death of petitioner's husband, she not knowing that she had any homestead right in certain of his real estate, which had been purchased by a third person at a tax sale, joined with her children, who were of age, in a deed to the purchaser, by which they quit-claimed all their interest in the property for $250. Petitioner was thereafter advised that she could hold the lot as homestead, whereupon she repurchased the property, which was worth about $1,700, for the same price for which she had sold it, and petitioned the probate court to have the same set aside to her as a homestead.

The court said: "Appellant alleges four errors, as follows: 'The court erred in making the order setting aside the property as a homestead for the respondent. The court erred in finding that the petitioner was residing on the premises when she filed her declaration of homestead. The court erred in finding that the property was suitable for a homestead. The court erred in finding that the property was not worth over $1,700, and in awarding homestead in the property without having the value determined by appraisers.' It is first argued that by the conveyance to Nellie Hoiby, respondent parted with her community interest and abandoned her homestead right, and that her repurchase of the property gave her no greater interest than her grantor had. The circumstances surrounding the transaction clearly show that the transfer to Nellie Hoiby and the retransfer by her to respondent placed the property as it was before the first transfer, with the exception of the mortgage and the interest of the heirs extinguished. But these transfers occurred more than a year prior to the declaration of homestead

by respondent, and before she knew that she was entitled to claim a homestead. So that in any event there could have been no abandonment of the homestead right. But even if she had selected the lot as a homestead before the conveyance, that conveyance alone would not constitute an abandonment of it, so that creditors might thereafter subject it to their claims. *In re* Feas' Estate, 30 Wash. 51, 70 Pac. Rep. 270. It is next claimed that respondent was not living on the premises, and that they were not suitable for a homestead. Respondent testified upon this subject positively that she was living there, and that the premises were suitable for her residence. There was no evidence to contradict these statements, except that the house was small and contained none of the usual conveniences, and that respondent was away a good part of the daytime, attending to business which she was conducting in Seattle. This was entirely insufficient to overcome the positive statements of respondent. There was no evidence that the property was worth more than $1,700. Nor was there any request for appraisers to appraise the lot. The statute does not seem to require appraisers in a case of this kind. Upon the whole record, the court properly set aside the lot as a homestead to respondent, and the order appealed from is therefore affirmed."

REPLEVIN—WHERE PROPERTY WAS PLACED IN HANDS OF AGENT FOR SALE, SUCH CONDITION EVIDENCED, PRESUMED TO CONTINUE TILL CONTRARY IS SHOWN.—In the case of Sandford v. Milliken (Mich.), 107 N. W. Rep. 884, it appears that an action of replevin was brought in which the plaintiff sought to recover the possession of a buggy. Her testimony tended to prove her ownership of the buggy; that by her direction the buggy was left with one Wes Baker with instructions to sell the same; that defendant took the buggy (but under what claim the record does not show) and refused to deliver it to plaintiff when she demanded its possession. The trial court refused to permit defendant to prove that "Mrs. Sanford (plaintiff) is not the owner of this buggy, was not originally the owner of it, did not purchase it in the first instance and never was the owner of the buggy, and that her husband was the owner of the buggy," and directed a verdict in plaintiff's favor.

Defendant contends that the judgment entered upon said verdict should be reversed because the court erred in excluding the testimony tending to prove that the buggy was owned by plaintiff's husband. To entitle a plaintiff to recover in an action of replevin, he must establish his right to the possession of the property replevined. This he may do by proving that he was in actual and undisputed possession when defendant took the property. If he had no such possession, he must prove title. If he bases his right to recover upon proof of title, defendant may defeat his recovery by proving title in a third person. Nicholson v. Dyer, 45 Mich. 610, 8 N. W. Rep. 515; Upham v. Caldwell, 100 Mich. 264, 58 N. W. Rep. 1001. If, however, the property was taken from the actual and undisputed possession of plaintiff, defendant cannot defeat recovery by proving title in a third person. He must in that case prove that he himself has a title superior to that of the plaintiff. Rose v. Eaton, 77 Mich. 255, 43 N. W. Rep. 972; Conely v. Dudley, 111 Mich. 122, 69 N. W. Rep. 151; Van Baalen v. Dean, 27 Mich. 106. Since the possession of her agent may be treated as her possession, the buggy while it was in the custody of Baker was in the possession of plaintiff. It may be inferred, too, that that possession was actual, exclusive and undisputed. Defendant contends that there is no testimony tending to prove that this possession continued at the time he took the buggy. This testimony is supplied by the presumption that a condition once shown to exist is presumed to continue until the contrary is proved. Defendant also contends that it may not be assumed that he would not have proved a title in himself superior to that of plaintiff had he been permitted to introduce the excluded testimony. The trial court had a right to assume that defendant in stating what he intended to prove, stated all he intended to prove. It was therefore proper to assume that he did not intend to prove a title in himself superior to that of plaintiff. We think the trial court did not err in excluding the profferred testimony, and that the judgment should be affirmed. Telegraphs and Telephones, 45 Cent. Dig. §§ 32, 33.

WHAT IS EQUAL PROTECTION OF LAWS AS APPLIED TO TAX LAWS?

Grave doubt of the correctness of a recent Missouri decision in The Collector v. Burlington Railroad [1] may with propriety be expressed upon the authority of decisions of the Supreme Court of the United States which, upon the point determined, should be regarded as controlling. The Supreme Court of Missouri, by unanimous vote *in banc*, there declared that the amendment of 1900 to the constitution of Missouri, found in Laws 1899, page 381,[2] "violates the fourteenth amend-

[1] 93 S. W. Rep. 784.

[2] The law is: "In addition to taxes authorized to be levied for county purposes, under and by authority of section 11, article 10 of the constitution of this state, the county court in the several counties of this state not under township organization, and the township board of directors in the several counties under township organization, may in their discretion levy and collect a special tax, not exceeding fifteen cents on each one hundred dollars valuation, to be used for road and bridge purposes, but for no other purpose whatever; and the power thereby given said county

ment to the constitution of the United States, in that it denies to all persons within the state the equal protection of the laws, which that amendment forbids any state to do."

The reason advanced for the asserted unconstitutionality is: "The amendment under consideration would have been a perfectly valid law if it had not been for the last sentence thereof, which exempted the cities of St. Louis, Kansas City and St. Joseph from ts operation, and might have been a valid law even excepting the city of St. Louis, because such law could not apply to that city, for the reason that it is an entire separate political subdivision of the state, and has no county court or township board and no county taxes; but, as above pointed out, such is not the fact as to Kansas City and St. Joseph, for they are constituent parts of Jackson and Buchanan counties, respectively. By so excepting those cities from the operation of the amendment (to the local constitution) the effect of the amendment was to discriminate in favor of those cities and against all other portions of the state, to impose an additional county tax of fifteen cents on the one hundred dollar valuation for road and bridge purposes in all the other parts of the state, at the discretion of county courts or the township boards, but to exempt from the operation of the law a large portion of the taxable wealth of those counties." The gist of the decision is that the guaranty of equal protection accorded by the fourteenth amendment requires that a tax, authorized by a law of Missouri must, if levied, operate upon all property of the class subjected to the tax in all parts of every "political subdivision" of the state in which the law operates. "Political subdivision" is doubtless thus used in its meaning as employed in the Missouri constitution, and Kansas City and St. Joseph are not "political subdivisions" in that sense, while St. Louis is.[3]

Remembering that the ground of the decision is that the law under consideration contravenes the equal protection guaranty of the fourteenth amendment, let us consider decided cases. The leading case of Missouri v. Lewis[4] decided that a law of Missouri, whereby disbarment causes originating in the city of St. Louis and the counties of St. Louis, St. Charles, Lincoln and Warren, were finally reviewable by the St. Louis Court of Appeals, while causes of similar character arising in all the other counties of Missouri, were finally reviewable by the supreme court of the state, did not deny to one disbarred by a judgment of the circuit court of St. Louis county the equal protection of the laws. It was there said as follows: "It (the fourteenth amendment) contemplates persons and classes of persons. It has not respect to local or municipal regulations that do not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which such regulations are made. The amendment could never have been intended to prevent a state from arranging and parceling out the jurisdiction of its several courts at its discretion. No such restriction as this could have been in view or could have been included in the prohibition that 'no state shall deny to any person within its jurisdiction the equal protection of the law.' It is the right of every state to establish such courts as it sees fit and to prescribe their several jurisdictions as to territorial extent, subject-matter and amount and the finality and effect of their decisions, provided it does not encroach upon the proper jurisdiction of the United States, and does not abridge the privileges and immunities of citizens of the United States, and does not deprive any person of his rights without due process of law, nor deny to any person the equal protection of the laws, including the equal right to resort to the appropriate courts for redress. The last restriction as to the equal protection of the laws is not violated by any diversity in the jurisdiction of

courts and township boards is declared to be a discretionary power. This constitutional amendment shall not apply to the cities of St. Louis, Kansas City and St. Joseph."

[3] Somewhat explanatory of the theory of the decision is the following excerpt: "A law which attempted to authorize certain counties of the state to have one kind of county government and prohibiting other counties in the state from having the same kind of government would not be an uniform or equal law, and would violate not only the constitution of this state but the fourteenth amendment to the constitution of the United States; but laws which authorize all of the counties of this state to have one or the other of two different kinds of local government, as the people may elect, *e. g.*, county organization or township organization, are general laws, and are constitutional because they confer equal privileges upon all of the people of the state."

[4] 101 U. S. 22.

the several courts as to subject-matter, amount or finality of decision if all persons within the territorial limits of their respective jurisdictions have an equal right in like cases and under like circumstances to resort to them for redress. Each state has the right to make political subdivisions of its territory for municipal purposes and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts; one system for one portion of its territory, another system for another. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a state to regulate its internal affairs to deny it this right. We think it is not denied or taken away by anything in the constitution of the United States, including the amendments thereto. We might go still further and say, with undoubted truth, that there is nothing in the constitution to prevent any state from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York city and the surrounding counties, and the common law and its method of procedure for the rest of the state, there is nothing in the constitution of the United States to prevent its doing so. This would not of itself, within the meaning of the fourteenth amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the state should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes of persons in the same place and under like circumstances. The fourteenth amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several states without violating the equality clause in the fourteenth amendment, there is no solid reason why there may not be such diversities in different parts of the same state. A uniformity which is not essential as regards different states, cannot be essential as regards different parts of a state. provided that in each and all there is no infraction of the constitutional provision. Diversities which are allowable in different states, are allowable in different parts of the same state. Where part of a state is thickly settled and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions—trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the powers of the state government if it could not in its discretion provide for these various exigencies. If a Mexican state should be acquired by treaty and added to an adjoining state or part of a state in the United States, and the two should be erected into a new state, it cannot be doubted that such new state might allow the Mexican laws and judicature to continue unchanged in the one portion and the common law and its corresponding judicature in the other portion. Such an arrangement would not be prohibited by any fair construction of the fourteenth amendment. It would not be based on any respect of persons or classes, but on municipal considerations alone and a regard to the welfare of all classes within the particular territory or jurisdiction."

Clearly the imaginary line separating the territories subject to the different laws, as illustrated in this decision, is not required by the fourteenth amendment to be the boundary of any municipality or county, or other political subdivision of the state, but may be a mere imaginary line, as, for instance, the *flum aquae* of the Osage river. In Barbier v. Connolly [5] it was expressly urged (and passed upon) that the ordinance of the consolidated city and county of San Francisco prohibiting the establishment or maintenance of a laundry within certain designated limits of

[5] 113 U. S. 27.

the city and county was a discrimination between laundrymen beyond the designated limits and those within such limits, amounting to a denial of equal protection, but the court said: "The same municipal authority which directs the cessation of labor must necessarily prescribe the limits within which it shall be enforced, as it does the limits in a city within which wooden buildings cannot be constructed. There is no invidious discrimination against any one within the prescribed limits by such regulations. There is none in the regulation under consideration. The specification of the limits within which the business cannot be carried on without the certificates of the health officer and board of fire wardens is merely the designation of the portion of the city in which the precautionary measures against fire and to secure the proper drainage must be taken for the public health and safety. It is not legislation discriminating against any one. All persons engaged in the same business within it are treated alike; are subject to the same restrictions and are entitled to the same privileges under similar conditions. * * * From the very necessities of society legislation of a special character, having those objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to permit, with as little individual inconvenience as possible, the general good. Though in many respects necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others is prohibited, but legislation which in carrying out a public purpose is limited in its application, if within the sphere of its application it affects alike all persons similarly situated, is not within the amendment."

In Hayes v. Missouri,[6] a law which allowed the state fifteen peremptory challenges in capital cases in cities of over 100,000 inhabitants —overruling the very positive opinion of the Missouri Supreme Court to the contrary, 81 Mo. 574, 586—while elsewhere in Missouri eight peremptory challenges only were allowed the state in similar causes, was held, citing the Lewis and Barbier cases, not to be a denial of equal protection, as follows: "The fourteenth amendment to the constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." In Chemical Company v. Mines Company,[7] it was said: "One claim was that the constitution of Maryland abridged the right to trial by jury in the courts of Baltimore city, without making a similar provision for the counties of the state, and that this denies to litigants of the city the equal protection of the laws. This is not tenable. Missouri v. Lewis, 101 U. S. 22; Hayes v. Missouri, 120 U. S. 68." In Gardner v. Michigan,[8] citing the Lewis case, it was held that plaintiff in error was not denied equal protection by a law of Michigan, pursuant whereto a jury, by which he was convicted, was selected from a list made and returned by commissioners appointed by the governor for Wayne county alone, while in all other parts of Michigan the jury list is made and returned by officers elected by the people in their several townships and city wards pursuant to general law of the state.

The true meaning of the guaranty of equal protection contained in the fourteenth amendment is expressed in the Lewis case as follows: "It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances." Although the doctrine thus announced was declared in cases arising in respect to the exercise of the judicial power of the state, the same meaning must be ascribed in all cases of the exercise of state power, since the prohibitions of the fourteenth

[6] 120 U. S. 68.

[7] 172 U. S. 475.

[8] 199 U. S. 333.

amendment operate as limitations upon every instrumentality of the state, legislative, executive or judicial in character, whether employing the sovereign powers of police, eminent domain or taxation.[9]

The same rule of construction of the fourteenth amendment in respect to its operation upon special assessments under state laws as against the objection of denial of equal protection, should be adopted in respect to general taxation, since special assessment for local improvement and the levy of general taxes are each an exercise of the sovereign power of taxation,[10] notwithstanding the attempted differentiation in the case under discussion, at page 787, as follows: "The term 'special taxes' as applied to the charging of the cost of the improvement of city streets against abutting property is not technically correct. Such charges are special benefits and not taxes in any sense of the word. If they were taxes they could not generally be enforced, because the amount would make the total tax exceed the limitation prescribed by the constitution."

The rule for general taxation, as contradistinguished from special assessment, is stated in Kentucky Railroad Tax Cases [11] to be that the state law providing for the division of

[9] Virginia v. Rives, 100 U. S. 318, 334; *Ex parte* Virginia, 100 U. S. 397; Scott v. McNeal, 154 U. S. 34; Railroad v. Chicago, 166 U. S. 233-4.

Illustrations of the application of the last quotation from the Lewis case are as follows:

Moore v. Missouri, 159 U. S. 678, a criminal prosecution involving the habitual criminal act of Missouri.

Brown v. New Jersey, 175 U. S. 176-7, where a defendant was tried for murder under a law of New Jersey by a struck jury and, though granted only five challenges by that law (while if he had been tried before an ordinary jury he would have had twenty challenges), was not, nevertheless, denied equal protection, the court citing Missouri v. Lewis to the effect that "a state might establish one system of law in one portion of its territory and a different system in another, and that in so doing there was no violation of the fourteenth amendment," and likewise the Hayes case, to the effect that the fourteenth amendment "does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate."

Maxwell v. Dow, 176 U. S. 598, where conviction for robbery by a jury of eight, rather than a jury of twelve authorized by a law of Utah, was sustained.

Mason v. Missouri, 179 U. S. 328, 332, where the difference of penalties provided by the Nesbit election law for offenses committed in St. Louis, as compared with penalties provided for similar offenses committed in other parts of the state by general state law, was held no denial of equal protection.

Lieberman v. VanDeCarr, 199 U. S. 563, in respect to a prosecution under the sanitary code of New York city relating to the sale of milk in that city, it was said: 'Nor do we think there is force in the contention that the appellant has been denied the equal protection of the laws because of the allegation that the milk business is the only business, dealing in foods, which is thus regulated by the sanitary code."

Marchant v. Railroad, 153 U. S. 389, and Railroad v. Chicago, 166 U. S. 226, both based upon the power of eminent domain, cite the Lewis case with approval.

In Kelly v. Pittsburgh, 104 U. S. 78, where the validity of an assessment of farm lands for general taxes for state and city purposes, pursuant to state legislation which arbitrarily brought such land within the limits of the city of Pittsburg (itself a part of Allegheny county) by reason of the inclusion of additional territory, was sustained against the objection that the fourteenth amendment was violated, the court saying: "It is not denied that the legislature could rightfully enlarge the boundary of the city of Pittsburgh so as to include the land (taxed). If this power were denied, we are unable to see how such denial could be sustained. What portion of a state shall be within the limits of a city and be governed by its authorities and its laws has always been considered to be a proper subject of legislation. How thickly or how sparsely the territory within a city must be settled is one of the matters within legislative discretion. Whether territory shall be governed for local purposes by a county, a city or a township organization is one of the most usual and ordinary subjects of state legislation. * * * It is no part of our duty to inquire into the grounds upon which those courts have so decided (*i. e.*, that farm lands within the limits of a city cannot be subjected by the legislature to taxation for city purposes;) they are questions which arise between the citizens of those states and their own city authorities, and afford no rule for construing the constitution of the United States."

In Davidson v. New Orleans, 96 U. S. 104-5, the leading case, Mr. Justice Miller, speaking with respect to special assessments, said: " * * * we lay down the following proposition as applicable to the case before us: That, whenever by the laws of a state or state authority, a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it is for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections. It may violate some provision of the state constitution against unequal taxation; but the federal constitution imposes no restraints on the states in that regard." True, the specific objection was that there had been deprivation of property without due process, but the language used is sufficient to comprehend the cognate guaranty of equal protection.

In Walston v. Nevin, 128 U. S. 582, involving the validity of a special assessment for local improvement it was held that "whenever the law operates alike on all persons and property similarly situated, equal protection cannot be said to be denied."

[10] Irrigation District v. Bradley, 164 U. S. 176.

[11] 115 U. S. 321.

property into different classes, with different regulations and methods of ascertaining valuation in the respective classes, but also the impartial application of such regulations and methods to all constituents of each class, so that the law shall operate equally and uniformly on all persons in similar circumstances, does not deny equal protection, which is practically affirmed in Insurance Company v. New York [12] as follows: "But the (fourteenth) amendment does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation and another kind of property to a different rate—distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property, nor does the amendment prohibit special legislation. Indeed, the greater part of all legislation is special, either in the extent to which it operates or the objects sought to be obtained by it. And when such legislation applies to artificial bodies it is not open to objection if all such bodies are treated alike under similar circumstances and conditions in respect to the privileges conferred upon them and the liabilities to which they are subjected." In Bell's Gap Railroad v. Pennsylvania,[13] it is said: "We think we are safe in saying that the fourteenth amendment was not intended to compel the state to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the states whose object is to secure equality of taxation and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require, which are necessary for the encouragement of needed and useful industries and the discouragement of intemperance and vice, and which every state in one form or another deems it expedient to adopt."

Again, persons (including corporations) may be classified for purposes of state control, and such differentiation will not deny equal protection, provided it is based upon some ground which, in relation to the subject-matter, affords reasonable cause for the differentiation.[14] Nor should we overlook *Ex parte* Swann,[15] a case decided by the Missouri Supreme Court, where a local option law applying, not by its terms but by its operation, to that part of Pike county outside the city of Louisiana, was held not to deny equal protection upon the ground that it applied to all persons within the territory or locality in which the law applied.

In view of these authorities, it should not be open to doubt that the guaranty of the fourteenth amendment of equal protection does not require that state legislation shall operate in all parts of each local political subdivision of the state. Were such the requirement of the amendment, the Hayes case could not have been decided as it was since the law there upheld would operate in Kansas City and St. Joseph, whenever they might acquire 100,000 inhabitants (which actually came to pass in 1890 and 1900, respectively), but not in other parts of Jackson or Buchanan counties respectively; nor could the Chemical Company Case, in 172 U. S. have been so decided since that law operated in the city of Baltimore, but not in Baltimore county, of which the city is a part; nor the Mason case, involving the Nesbit law. The conclusion is irresistible that the guaranty of equal protection contains no prohibition against the application by the state of different local laws to particular localities regardless of whether the territory to which the law applies is a complete local political subdivision, or group of subdivisions, or a segregated part or parts of such subdivision. Since, moreover, classification for purposes of taxation is permissible, why may not the differentiation or classification be, in the case under discussion, based upon the fairly reasonable distinction that money for betterment of highways in St. Louis, Kansas City,

[12] 134 U. S. 606.

[13] 134 U. S., at 237.

[14] Railway v. Humes, 115 U. S. 512; Railway v. Mackey, 127 U. S. 209; Railway v. Beckwith, 129 U. S. 26; Moore v. Missouri, 159 U. S. 678; Holden v. Hardy, 169 U. S. 384; St. John v. New York, 201 U. S. 633.

While instances of the transgression of this rule are: Railway v. Ellis, 165 U. S. 150; Cotting v. Stock Yards, 183 U. S. 79, and Connolly v. Sewer Pipe Company, 184 U. S. 559, in that the legislation assailed discriminated against certain classes of persons with no reasonable ground therefor.

[15] 96 Mo. 44.

and St. Joseph, is already raised by special assessment, while in the rest of the state the value of land will not admit of special assessment? While the differentiation is in terms one of locality, the reason of the distinction is the different character of taxable property in the differentiated classes.[16]

It is to be regretted that the opinion in the case under discussion does not notice a single one of the decisions, above cited, of the Supreme Court of the United States whose peculiar province it is to finally construe the federal constitution, especially in view of the fact that no writ of error will lie from that court (under Sec. 709, R. S. U. S.) to review the judgment of the Missouri court, the right set up under the constitution not having been denied, but, on the contrary, conceded by the state court.[17] Since in neither case is the fourteenth amendment mentioned, the applicability of their decision to the case before the court in respect to the fourteenth amendment is highly questionable.

C. R. SKINKER.

St. Louis, Mo.

[16] St. John v. New York, 201 U. S. 638.

[17] Singularly enough, the only cases from the federal supreme court relied upon in the opinion are: Gilman v. Sheboygan, 2 Black, 510, decided at December term, 1862, which was prior to the final adoption of the fourteenth amendment (July 28th, 1868), and for that reason alone no authority upon the construction or application of that amendment, the case otherwise going off upon a lack of uniformity of taxation under a law of Wisconsin exempting personal property from the tax, in a cause wherein jurisdiction was originally obtained by an averment of the impairment of the obligation of a contract evidenced by municipal bonds (though even this case does not sustain the principle enunciated by the decision in the case under discussion, since the Gilman case quotes with approval from Bank v. Hines, 3 Ohio St. 1, to the effect that "the uniformity must be coextensive with the territory to which it applies. If a state tax, it must be uniform all over the state. If a county or city tax, it must be uniform throughout the extent of the territory to which it is applicable", and

Pine Grove v. Talcott, 19 Wall. 666, an alleged conflict between the law under which bonds were issued by a municipality of Michigan with the local constitution.

FALSE IMPRISONMENT—DISTINGUISHED FROM MALICIOUS PROSECUTION.

WESTERN UNION TELEGRAPH CO. v. THOMPSON.

Circuit Court of Appeals, Fifth Circuit, March 6, 1906. Rehearing Denied April 3, 1906.

An amendment of a count of complaint for malicious prosecution by striking out an allegation that plaintiff was arrested on a warrant, and substituting an allegation that she was arrested and held without a warrant changed the cause of action stated, under the law of Alabama, from one in case for malicious prosecution to one in trespass for false imprisonment, and rendered the charge of the court based on the theory that the count was for malicious prosecution misleading and erroneous.

Under the law of Alabama where malice and want of probable cause are alleged in the complaint, in an action for false imprisonment, they must be proved to warrant a recovery.

Under the law of Alabama an action in trespass for false imprisonment cannot be maintained against a corporation based on the negligent and unauthorized act of a mere servant working under the immediate orders of a superior.

A party should not be permitted to obtain a reversal of a judgment by taking one position in the trial court as to the cause of action stated in a count of the complaint, which was acquiesced in by the court, and another and antagonistic position in the appellate court. *Per* Shelby, Circuit Judge, dissenting.

This suit was originally instituted by the defendant in error, in the city court of Birmingham, to recover damages of the plaintiff in error, and was subsequently removed to the circuit court. The complaint, filed by the plaintiff, contained the three following counts:

"First Count. The plaintiff claims of the defendant $5,000 damages for maliciously, and without probable cause therefor, causing the plaintiff to be arrested and imprisoned on a charge of obtaining money under false pretenses for a long time, to-wit, one day, on the 29th day of October, 1901. Plaintiff avers that she was incarcerated in the city jail of Birmingham, Ala., which jail was filthy, full of bad odors and vermin, and that she suffered great mental and physical distress and pain therefrom, and was made sick, sore and disordered, all to her damage the amount aforesaid.

"Second Count. The plaintiff claims of the defendant $5,000 damages for maliciously, and without probable cause therefor, causing the plaintiff to be arrested under a warrant issued by C. W. Austin, chief of police, of Birmingham, Ala., on the 29th day of October, 1901, on a charge of obtaining money under false pretenses, which charges, before the commencement of this action, had been judicially investigated and said prosecution ended, and the plaintiff discharged. And plaintiff avers that she sustained the injuries and suffered the damages set out more particularly in the first count of the complaint.

"Third Count. Plaintiff claims of the defendant $5,000 damages for wrongfully imprisoning plaintiff, or causing plaintiff to be imprisoned in the city jail of Birmingham, Ala., or restrained against her will, on the 29th day of October, 1901. And plaintiff avers that she sustained the injuries and suffered the damages set out more particularly in the first count of the complaint."

Prior to the trial the plaintiff below amended the second count by striking out the words, "Under a warrant issued by C. W. Austin, chief of police of Birmingham, Ala.," and inserting in lieu thereof the following: "Without a warrant by a policeman of the city of Birmingham for the violation of an ordinance of said city." The answer of the defendant below consisted (1) of a plea of not guilty; (2) a general denial; and (3) a plea of justification of the arrest by an officer. At the conclusion of the testimony the defendant requested a general affirmative charge in its favor, and the following instructions which were by the court refused: "(1) The court charges the jury that, if they believe the evidence, they cannot find for the plaintiff under the first count of the complaint. (2) The court charges the jury that, if they believe the evidence, they cannot find for the plaintiff under the second count of the complaint. (3) The court charges the jury, if they believe the evidence, they cannot find for the plaintiff under the third count of the complaint. (4) If the jury believe from the evidence that E. E. Williams was the manager of and represented the defendant telegraph company in the conduct of its business at Birmingham, and further believe from the evidence that said Williams did not request, or direct, the officer who arrested the plaintiff to arrest her, and that her arrest by the officer was made upon a charge preferred by another employee of the defendant, and at the request of the said other employee, then the plaintiff cannot recover under the first and third counts of the complaint. The law is that an agent cannot delegate his authority, and if Williams was the vice principal, or representative of the defendant, he could not delegate that authority to another; and the defendant would not be liable in trespass for the act of another employee, unless that other employee was clothed with authority by the defendant to do the act complained of." The court then submitted to the jury its general charge, the following part of which was excepted to by the defendant: "Here was a corporation engaged in the business of transmitting money from abroad to people here, and it had a general manager and a general superintendent here. I charge you as a matter of law that the general superintendent in the management of that business had the right, within the line of his duty, if he believed that a person had obtained money from the telegraph company by false pretense that had been sent here for transmission, to act for the corporation and cause his arrest, and the corporation would be responsible for compensation if the arrest was wrongful."

The trial resulted in a verdict and judgment for the plaintiff, for the revision of which the defendant brought the cause to this court by writ of error.

Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

MAXEY, District Judge, after stating the case, delivered the opinion of the court.

It is evident that the cause was submitted to the jury on the theory that the first and third counts of the complaint were in trespass for false imprisonment, and that the second was in case for malicious prosecution. And, indeed, such was the attitude of the suit, as made by the pleadings in their original form, but the amendment of the second count eliminated malicious prosecution as a cause of action and converted that count into one, also, of trespass for false imprisonment. As the second count stood originally, it charged that the defendant caused the plaintiff to be arrested under a warrant issued by C. W. Austin, chief of police, etc., and hence contained apt words to charge a case against the defendant for malicious prosecution. Thus it was said by the Supreme Court of Alabama in Rich v. McInerny, 103 Ala. 351, 352, 15 So. Rep. 665, 49 Am. St. Rep. 32: "If the imprisonment is under legal process, but the prosecution has been commenced and carried on maliciously and without probable cause, terminating in the discharge of the defendant, it is malicious prosecution, and not false imprisonment. 7 Am. & Eng. Enc. Law, 663. The action for damages for false imprisonment is in trespass, for malicious prosecution, in case." See also Ragsdale v. Bowles, 16 Ala. 62. And by the same court it was said in Davis v. Sanders, 133 Ala. 278, 32 So. Rep. 499: "The complaint contained two counts; the first being in Code form (No. 19, p. 946, Code 1896) for false imprisonment; the second being the same, with additional averments of matters showing aggravation. Both counts are in trespass. Ragsdale v. Bowles, 16 Ala. 62; Sheppard v. Furniss, 19 Ala. 760; Holly v. Carson, 39 Ala. 345; Rhodes v. King, 52 Ala. 272; Rich v. McInerny, 103 Ala. 345, 15 So. Rep. 663, 49 Am. St. Rep. 32, 13 Ency. Pl. & Pr. 427, 428, 429, note 1. The amendment of the second count by the additional averment that 'said charge before the commencement of this action had been judicially investigated and said prosecution ended and the plaintiff discharged,' did not change the character of the count from one in trespass for false imprisonment to one in case for malicious prosecution. As amended, it was still wanting in averments essential to constitute a count for malicious prosecution. An averment of the issuance of process properly describing it, and the plaintiff's arrest and imprisonment by virtue thereof, is essential in an action on the case for malicious prosecution."

From a perusal of the general charge of the court it will be readily observed that, obviously through inadvertence of the learned judge, the attention of the jury was mainly directed to the

count for malicious prosecution, which had, as we have seen, disappeared from the pleadings, and no longer constituted an issue in the case. And it is reasonably clear that the charge thus given had the effect of misleading and confusing the jury upon the real issues before the court to the prejudice of the defendant. Instructions to a jury must be based upon, and be applicable to, the pleadings and evidence. They should be neither broader nor narrower than the pleadings, but should be predicated of all the issues raised by the pleadings and supported by the evidence, and they are equally faulty whether they enlarge or restrict the issues. 11 Enc. Pl. & Prac., pp. 158-160, and authorities cited. It may be further observed that where the complaint is in trespass for false imprisonment, and it is alleged that the arrest was caused, by the party complained of, with malice and without probable cause, the proof should establish the existence of those elements to authorize a recovery. In speaking of the form of complaint and of the necessity for such proof, it was said by the Supreme Court of Alabama, in Rich v. McInerny, 103 Ala. 354, 15 So. Rep. 666, 49 Am. St. Rep. 32: "The action is maintainable only when the arrest and imprisonment are done or caused by the defendant, upon a criminal charge, with malice and without probable cause. * * * It alleges arrest and imprisonment of plaintiff, by the procurement of the defendant, upon a charge of larceny, with malice, and without probable cause. Being alleged, these elements must be shown to have existed, to justify a recovery by the plaintiff." At pages 356, 357, of 103 Ala., p. 667 of 15 So. Rep., 49 Am. St. Rep. 32, it was further observed: "The court tried the case upon the theory that the existence of malice and want of probable cause, actuating the defendant to cause the arrest, if he did cause it, were immaterial. We have shown that they were material by reason of being alleged. It was incumbent on plaintiff to satisfy the jury of both."

It is also insisted by the defendant that the trial court erred in giving in charge to the jury that portion of the general charge set out in the statement of the case, and in refusing the special instructions by it requested. The charge of the court was correct as it applied to Williams, who was the general manager and vice principal of the defendant at Birmingham, and who stood for and represented, within the sphere of his authority, the corporate entity itself. Hence, for a trespass committed by him, in his representative character, or for one commanded or authorized by him in such character, suit would be maintainable against the defendant in trespass. Southern Bell Telephone Co. v. Francis, 109 Ala. 224, 19 So. Rep. 1, 31 L. R. A. 193, 55 Am. St. Rep. 930. But case, and not trespass, would be the appropriate remedy where the injury grew out of the negligent and unauthorized act of a mere servant working under the immediate control and orders of a superior. This distinction is illustrated by the cases of City Delivery Co. v. Henry, 139 Ala. 161, 34 So. Rep. 389; Railway Company v. Freeman, 140 Ala. 581, 37 So. Rep. 387; Southern Railway Co. v. Yancy (Ala.), 37 So. Rep. 342.

And further it may be said that as the several counts of the complaint are in trespass and count upon the malicious and wrongful act of the defendant corporation, and not upon wrongs committed by its servants, their averments are not supported by evidence showing that the injury complained of was inflicted by a mere subordinate office employee of the defendant, acting without authority from his principal, even should it be assumed that his act was wrongful and malicious. Southern Railway Co. v. Yancy, *supra*. Nor does this ruling conflict with the admitted and settled principle of law, as held by the Supreme Court of Alabama, that the master, in the appropriate form of action, will be held liable in damages for injuries willfully and intentionally inflicted by the servant while acting within the general scope or line of his employment. City Delivery Co. v. Henry, *supra*. In the present case the proof was conflicting as to whether Williams caused the arrest of the plaintiff, or whether she was arrested at the command and instigation of a mere subordinate employee in the defendant's office; and, as it was the purpose of the special instruction to submit this issue to the jury, we are of the opinion that the court erred in refusing it.

For the errors indicated, the judgment should be reversed and the cause remanded for a new trial, and it is so ordered.

Reversed and remanded.

On petition for Rehearing.

Per CURIAM. No one of the judges who joined in the decision of this case desiring a rehearing, the same is refused.

Note 1.

Jones, District Judge, charged the jury as follows:

"This complaint contains what lawyers call three counts, three different ways of stating the grievance or complaint of the plaintiff. The first and third counts are what the law calls counts for false imprisonment.

"False imprisonment is the legal restraint of a person against his will. For instance: I might have stolen something and might be guilty, yet, if I was illegally restrained of my liberty on that account, the person doing it would be guilty of false imprisonment. I want you to bear that distinction in mind, and not confuse these counts with the second count, which is an action for malicious prosecution, and is governed by different considerations. Now, you understand that false imprisonment is merely the illegal restraint of a person against his will.

"Let us take that up first. Was there any false imprisonment in this? I charge you that, under the charter of the city of Birmingham and the law of Alabama, it does not make any difference in this case, so far as the legality of the arrest is

concerned, whether there was a warrant or not. It is of no consequence in this case.

"So, then, the question you are to consider, so far as this branch of the case is concerned, is this: How did that arrest come to be made? Was it made in pursuance of the direction and command of the defendant by the police officer, without the exercise of his own independent judgment and conscience as to whether the party ought to be arrested? An officer may act not merely on his own knowledge, but upon any information that comes to him from a reputable source that is calculated to carry to his mind the conviction that there is probable cause for believing the person guilty of the offense. Otherwise, in very many instances, the parties would evade justice and get away while one is getting a warrant; and that is the reason the law recognizes an arrest without a warrant. What was the moving cause of this arrest? Did the police officer make the arrest at the command of the defendant's agents against his judgment, or was the arrest, when the charge was made, the product of his conscientious judgment and belief, after hearing all the facts, that this was a case where there was a probable cause for believing the party guilty? If that was the fact, then there would not be false imprisonment, because the arrest would be lawful. On the other hand, if the policeman did it at the dictation and command of the defendant—if that was the moving cause, and not because of his belief that there was probable cause of her guilt—then the defendant would be guilty of false imprisonment.

"Next, we come to the malicious prosecution: In order to make out that offense, the party must have acted with malice, and without probable cause. If he has probable cause, it doesn't make any difference about his malice, because probable cause is enough to authorize the arrest of a person for a crime, and when a person is acting on probable cause and procures the arrest of another, he is not guilty of malicious prosecution, although his motive may have been very bad. Probable cause of itself, alone, is always a defense to this action.

"Now, what were the facts? You are the judge of the facts. You have heard all the testimony, and, in order to satisfy yourselves of what happened, you will have to solve that question by your knowledge of human nature, and of the habits and customs of people, under similar circumstances, in such transactions in view of all that has been related to you. It seems that there were two Loula Thompsons. The money was sent, according to the evidence, from Jackson, Tenn., from a Thompson up there, to be transferred by telegraph to one Loula Thompson. It seems that defendant's officers sent for the plaintiff first. The plaintiff came there and the plaintiff was paid $12. The plaintiff was expecting some money from Montgomery, according to the evidence. You are the judges of that, however. My recollection is that the plaintiff stated that she had not sent to Jackson, Tenn., and was not expecting any money from Jackson, Tenn. What happened when this money was paid out? You have heard all the testimony. If the plaintiff was questioned as to where she was expecting this money from, and stated, in answer to questions (it is for you to determine, and not the court), that she was expecting money from Jackson, Tenn., and that she was the person for whom the money was intended, then that would be a false pretense, although her name was Loula Thompson, the name of the person for whom the money was sent. On the other hand, if the telegraph company, knowing she had telegraphed to Montgomery to her people there to send her money on account of her house being burned, offered her the money and did not inquire of her about Jackson, Tenn., then she would not have been guilty of false pretense in taking this money, although, as it turned out, it was not intended for her. In order to constitute a false pretense, she must be guilty of some deception by stating or pretending there were existing facts, or some past fact which did not in fact exist, that was acted on by the other side, and which was one of the causes that induced the telegraph company to part with its money. If there was probable cause for believing that she obtained the money by false pretense, then the company was not under obligations to send her back home to get the money, or to let her go back home. If a party has committed an offense of that sort, the repayment of it, as far as the law is concerned, doesn't blot out the offense, or pardon the offense. You have the substance of this course, so far as the malicious prosecution is concerned. Was there probable cause for believing—you have heard the testimony—was there probable cause for believing that she misrepresented the facts as to her being the Loula Thompson for whom this money was intended? Did she tell those people, as I have already explained to you, that she was expecting money from Jackson, Tenn.? If she did she was guilty of obtaining money under false pretenses under this evidence. But if she did not, and the telegraph company had not informed her that this money was from Jackson, Tenn., and handed it over to her without inquiry, and she believed it came from Montgomery, then she would not be guilty of obtaining money under false pretenses, and there would not be a probable cause for her arrest, although the money was not sent for her.

"Now, then, coming to the last proposition: This arrest, if you should get that far and find the defendant's act unwarranted, must be the act of the defendant. You cannot see a corporation. You cannot put your hands on it. It is a fiction of the law, but it acts by human agents. Here was a corporation engaged in the business of transmitting money from abroad to people here, and it had a general manager and a general superintendent here. I charge you as matter of

law that the general superintendent, in the management of that business, had a right, within the line of his duty, if he believed that a person had obtained money by false pretenses from the telegraph company that had been sent here for transmission to others, to act for the corporation and cause his arrest, and the corporation in that event would be responsible for compensation to the plaintiff if the arrest was wrongful; that is, as I have already explained to you, either a lawless arrest, or with malice and without probable cause.

"A corporation cannot be responsible in a case like this for what we call 'smart' money, or vindictive damages. Sometimes the jury, for the good of society, when some outrageous lawlessness is committed, may award not only compensation to a party, but may go further for the benefit of the public, and say to the law-breakers: 'I will sting you, and put a little more on you. I will chastise you and make you smart; and, although the injured party has not been damaged the whole amount, I will give the additional sum for the public good.' This is not a case of this sort under the decision of the Supreme Court of the United States. If you reach the conclusion, under any phase of the case, about which you have been instructed, that damages ought to be awarded, you can only award compensation; that is, to make the party whole. Included in compensation, though, you can give what you consider conscientiously a fair amount for the mortification and physical discomfort to which the party was subjected by arrest, and for the sickness, if any was caused thereby, and any expense, although I don't believe there is any proof of expense to which the party was put in getting free of the arrest. I believe that covers the case."

Note 2.

The following are the portions of the Code of the city of Birmingham offered in evidence:

"Sec. 100. Arrest Without Warrant. When and By Whom Made. It is the duty of the marshal and every policeman to arrest, without warrant, all persons found violating any ordinance of the city, or whom he has reason to believe has violated any city ordinance, all persons found disturbing the peace by disorderly conduct, all persons found drunk on the public streets, or in any public place in the city, and all persons found under suspicious circumstances, who fail to give satisfactory account of themselves. And said officers shall have authority to enter any house, inclosure, or other place in which they have reason to believe that any person is committing, or about to commit, a violation of the city laws."

"Sec. 579. False Pretense. Any person who by false pretense or token, and with the intent to injure, or defraud, obtains from another any money or other personal property, or thing of value, must, on conviction, be fined not less than one, nor more than one hundred dollars."

NOTE.—*A Litigant, on Appeal, will Not be Heard to Complain of Error which he has Induced the Trial Court to Commit.*—It seems to us that the holding of the Alabama court under the circumstances of the principal case is one that justly meets the condemnation of those who believe that the law is made for practical uses. It certainly could not be said that the defendants were in any way at a disadvantage, for they treated the second count as one in case for malicious prosecution, and so did the judge who tried the case. In view of the fact that there were two other counts for false imprisonment, and the charge of the judge related to both false imprisonment and trespass, and no exception was taken to the charge that would point out to the trial court the alleged error, to send back the case for trial *de novo*, and thereby delay justice and add expense which must be incurred solely because the defendants at the trial failed to make the objections which should have been made if they did not wish to stand by their defense, which answered every purpose, as far as the merits of the case were concerned, as though the pleadings had correctly set forth a charge of trespass on the case for malicious prosecution, seems to us absurd. They certainly had the chance to have their day in court and should not be permitted to raise the question upon appeal, for the law is well established as set forth in the sensible dissenting opinion by Mr. Justice Shelby, who says: "I do not think a party should be permitted to obtain a reversal by taking one position in the trial court and another antagonistic position in the appellate court. It is wholly unfair to permit a reversal to be obtained in that way. Consistency is a jewel even in the trial of a law suit. When a party assumes a certain position in a legal proceeding, he cannot be permitted afterwards, when it is to his interest to do so to assert the contrary. The defendant company in the court below asserted that the second count was in case the plaintiff acquiesced, and the court accepted this assertion as correct. Here it asserts that the count is in trespass. I do not think the plaintiff in error should be permitted to gain an advantage by such a change of position."

In Walton v. Chicago, etc., Ry. Co., 56 Fed. Rep. 1006, 6 C. C. A. 223, the court said: "It is a well established doctrine that parties to a suit must act consistently, and that they will not be heard to complain of error which they themselves committed or induced a trial court to commit."

Boiled down to a practical consideration of justice, the arrest was due to the act of the agent of the telegraph company in reference to a matter which was the business course pursued by that agent for the company. He caused the arrest of an innocent party. It was of very little importance from a practical view how she was arrested, and it would seem that practical justice had been done. Having pursued a course which led both the court and jury, as well as the defendant in error along a line which has resulted in a judgment for the defendant in error, it seems unjust that the plaintiff in error should be permitted to gain an advantage by such a wrong. In the case of Railway Co. v. McCarthy, 96 U. S. 267, Mr. Justice Swayne said: "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot after litigation has begun, change his ground and put his conduct on another and different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a well settled principle of law." Citing Gold v. Banks, 8 Wend. (N. Y.) 562; Holbrook v. White, 24 Wend. (N. Y.) 169; Everett v. Saltus, 15 Wend. (N. Y.) 474;

Duffy v. O'Donovan, 46 N. Y. 223; Winter v. Coit, 7 N. Y. 288; Wright v. Reed, 3 Dumf. & E. 554.

In the case of Brooks v. Laurent, 98 Fed. Rep. 647, the court held that a married woman who joins with her husband in a bill in equity, which is sworn to by her as well as her husband, for relief based upon a lease of her property, which the bill alleged was made by her husband with her consent, after such allegation and the validity of the lease had been admitted by the answer of the defendant, and the cause has proceeded to hearing upon the issues joined, cannot take the position on such hearing or on a subsequent appeal that the lease is void because not executed by her as required by statute. In this opinion the case of Railway Co. v. McCarthy is approved, as well as the case of Davis v. Wakelee, 156 U. S. 680, 691. In the latter case Davis had in a judicial proceeding asserted the validity of a certain judgment. The judgment was in fact void for want of jurisdiction. The court held that Davis nevertheless was estopped in equity from claiming that it was void. Mr. Justice Brown, delivering the opinion of the court, said: "Even if Davis had been mistaken as to his legal rights with respect to this judgment and his subsequent discharge, his assertion that it was still of record and in full force is none the less binding on him, in view of Wakelee's acquiescence in the ruling of the court sustaining this contention." The learned justice added: "It may be laid down as a general proposition that where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position taken by him."

It seems to us that the dissenting opinion of Mr. Justice Shelby is correct, and that the majority of the court could have given but little consideration to the law upon the subject, which is nothing more than common sense justice.

A CORRECTION.

[The above note was published as a note to the case of Western Union Tel. Co. v. Houston Rice Mill. Co., published in last week's issue on page 306. This note was intended to follow the case of Western Union Tel. Co. v. Thompson, published in this week's issue, p. 324, as above. The note intended to follow the case of Western Union Tel. Co. v. Houston Rice Mill. Co., in last week's issue was made up in the form in this week's issue, and we only discovered the error at the last moment through the courtesy of several of our subscribers, who promptly notified us of the error. We will publish the note which should have followed the case of Western Union Tel. Co. v. Houston Rice Mill. Co., in next week's issue. Subscribers can correct this error at that time by proper cross-references. We certainly regret the error, which, however, is the first of its character to happen. We shall take extra precautions that such a provoking inconsistency shall never result again.—EDITOR.]

JETSAM AND FLOTSAM.

WILLS EXECUTED WITHOUT ANIMUS TESTANDI.

The Supreme Court of Massachusetts has recently decided a case involving a fundamental question concerning the law of wills that is not often directly presented. The question is as to proof that a will drawn in due form by a scrivener, and executed by a sober man in sound health of body and mind and under no restraint, was not executed as a will, nor intended ever to have effect as such.

The will in question was offered for probate by Mary Fleming, the executrix and sole beneficiary therein named. In reversing a decree allowing probate of the will, the court said: "The finding that before Butterfield and Goodrich 'parted' Butterfield told Goodrich that the instrument which had been signed by Butterfield as and for his last will and testament, and declared by him to be such in the presence of Goodrich, and attested and subscribed by Goodrich as witness, 'was a fake, made for a purpose,' is fatal to the proponent's case. This must be taken to mean that what had been done was a sham. This is not cured by the further finding that what Butterfield meant by this was 'that he did not intend to complete the instrument by having it attested and subscribed by at least two other witnesses, and that the purpose referred to by him was to induce said Fleming to allow him to sleep with her. This is not a finding that Butterfield intended to sign the instrument before Goodrich as and for his last will and testament, leaving the further execution to depend on future events. Much less is it a finding that Butterfield changed his mind after he had signed, and had had Goodrich attest and subscribe the instrument. The whole finding, taken together, amounts to a finding that Butterfield had not intended the transaction which had just taken place to be in fact what it imimported to be." The court held that parol testimony to prove these facts was competent. Fleming v. Morrison (Mass. 1904), 72 N. E. Rep. 490.

Cases of this kind are not analogous to cases in which deeds purporting to be real and required by law to be witnessed, have been proved by parol to have been intended for some different purpose than appears by the writing; for deeds have to be delivered, wills do not; deeds operate from execution, wills from the death of the maker; the maker of the deed may confute the perjured story, but in the case of the will the perjurer knows that the only man having knowledge to expose him is safely out of the way. The distinction is recognized by the court in this case. The danger of permitting parol evidence thus to outweigh the sanction of a solemn act is obvious. It has a tendency to place all wills at the mercy of a parol story that the testator on this most serious occasion did not mean what he said and did. On the other hand, an inflexible rule admitting of no proof to the contrary might work great hardship in peculiar cases It would seem that such proof should be held competent, for this reason.

In this case the court reviewed the principal cases similar to the one at bar, in one of which, Lister v. Smith (1863), 3 Sw. & Tr. 282, Chaplin's Cases on Wills, 250, it was proved that the testator wished one of his family to give up a house she then occupied, and to induce her to do so, made pretence of revoking by codicil a bequest he had made for her daughter in his will. He explained his purpose to his attorney, who pointed out the folly of it to him, and refused to have anything to do with it; but the testator made the

codicil and delivered it to his brother with instructions to use it for the purpose intended, in no event to part with it, and that it was not to be allowed to operate. In deciding the case, Sir J. P. Wilde held the evidence competent; and being clear and cogent, it satisfied him to act on the finding of the jury. But he added: "I am far from saying that the court will in all cases repudiate the testamentary paper simply because a jury can be induced to find that it was not intended to operate." He said: "It is difficult to impress them with the enormous weight which attaches to the document itself as evidence of the animus with which it was made. This weight it becomes the court to appreciate, and to guard with jealousy the sanction of a solemn act." In another case cited, Nichols v. Nichols (1814), 2 Phillim. 180, Chaplin's Cases, 253, Abbott's Cases, 270, the will was in these words: "I leave my property between my children; I hope that they will be virtuous and independent—that they will worship God, and not black coats. July 30, 1803. Thomas Nichols. Witness, Thomas King." The witnesses swore that the will was made in the library of a friend after a private banquet, and that it was made to illustrate the ridiculous tautology employed by lawyers in drawing up legal papers, and was never intended as a will at all. On this proof probate was denied.

In re Goods of Hunt (1875), L. R. 3 Prob. & Div. 250, Mechem's Cases on Wills, 30, Abbott's Cases, 264, is also cited, in which it was held, as it has been in several other cases, that a will cannot be admitted to probate when it appears that it was executed by mistake, when the testator intended to sign another paper. In this case sisters made mutual wills, and each signed the one prepared for the other.—*Michigan Law Review.*

THE WOMAN LAWYER.

She was a fair and radiant maiden,
Just admitted to the bar,
And her many friends predicted
She'd become a legal star.
Winsome face and winning manners
And her smile was like a beam;
Graceful form and rythmic movement—
The very essence of a dream.

Scarcely had she swung her sign out
To the sporting of the gale
Than a broken-hearted husband
Came to tell a woeful tale.
How his wife had gone and left him
With a babe scarce two years old;
Leaving not a ray of sunshine
On his hearthstone, bleak and cold.

Told about their many troubles,
Blaming her for all, of course;
Told how she had further wronged him
By an action for divorce.
"And I came here to engage you
'Cause her lawyer is a man;
And I know you can outwit him,
As a woman always can."

By and by the day of trial
Came to test this maiden's power,
And she calmly waited for it,
And prepared against the hour.

Many were the idle loungers
Hanging 'round the court that day,
All expectant that the trial
Would be spicy as a play.

Now the judge, a sternfaced bachelor—
Who, 'twas whispered, never wed
'Cause the only girl worth loving,
In his mind, was long since dead—
Wore a frown upon his features
As he called this fatal case;
But the winsome, woman lawyer
Wore a smile upon her face.

As the evidence was offered
Well she stood the trying test,
And in cross-examination
Showed no little skill and zest.
When the testimony ended,
And the time had come to speak,
Just the slightest touch of scarlet
Tinged the velvet of her cheek.

Calmly did she state the issue,
And applied the evidence:
Showing how, in every aspect,
It supported the defense,
Then she pictured all the horrors
Of a home without a wife
To console and cheer and comfort,
And bring sunshine into life.

Spoke of solemn vows unheeded
By the plaintiff in the case,
And with fierce denunciation
Called to mind his deep disgrace.
Shamed her sex and scorned such conduct
Till her withering words and frown
Seemed to pierce the very heavens
And call retribution down.

All the idle loungers listened.
Leaning forth to catch each word
As one listens in the twilight
To the song of some sweet bird.
Then she deftly turned the picture,
Painted home with wife and child:
Father, mother, prattling baby—
E'en the grim court faintly smiled;

For she seemed to touch some secret
Hidden chord within his breast;
Called to mind a hope long buried
Which his soul had once possessed;
And her honeyed words kept flowing
As she called up visions fair
Of the model home and home life
Of a truly wedded pair.

One could almost smell the flowers
Blooming round the cottage door;
One could almost see the sunshine
As it danced upon the floor;
See the hummingbird that fluttered
Round the honeysuckle vine;
Almost feel the smile of heaven
Beaming on that home divine.

And the court room seemed to vanish
As she led their thoughts away
To a paradise of beauty,
As she plead her cause that day.

And she won it, as she ought to:
Won the first case of her life:—
But she'll never win another
For she's now the judge's wife.

ADDENDUM.

Maidens all who hear this story—
Don't be foolish now, oh, pshaw,
There are not enough of judges:—
Don't begin to study law.

—BRECHER W. WALTERMIRE, *Author of "Buckeye Ballads," in Ohio Law Bulletin.*

BOOKS RECEIVED.

The Law of Innkeepers and Hotels, including Other Public Houses, Theatres, Sleeping Cars. By Joseph Henry Beale, Jr., Bussey Professor of Law in Harvard University. William J. Nagel. Boston, 1906. Buckram. Price, $6.00. Review will follow.

HUMOR OF THE LAW.

Rufus Choate was once trying a case before Justice Shaw, and one witness who took the stand was a minister.

"What is your name?" asked Choate.

"Ezekiel Lee," answered the witness.

Justice Shaw, not hearing readily, leaned forward and asked Choate what the witness said.

"He said, Your Honor, that his name was Ezekiel Lee," replied Choate.

"What is your occupation?" continued Choate.

"I am a humble candle bearer of the Lord," replied the witness.

"Justice Shaw bent over the bench and inquired what the witness had said. Choate responded, saying that the witness had said that he was a humble candle-bearer of the Lord.

"Of what denomination are you?" questioned Choate.

"I am a Baptist," replied Lee.

Again Justice Shaw leaned forward and asked what the witness had said, and Choate replied: "He said, Your Honor, that he was a dip-candle."

Several years ago an old lady by the name of Morrell, living in Lisbon, N. H., was summoned to court as a witness against one of her neighbors. It was her first experience, and she thought it was a terrible thing. Her voice quavered while she was giving her testimony, and her whole body trembled perceptibly when she was cross-examined by the opposing counsel, who hoped to break down her evidence by showing loss of memory.

"How old are you?" was asked.

"I'm almost seventy; shall be next birthday," she replied.

"You are not very well, I see; you seem nervous and excited. Is your memory good?"

"Not very," she answered.

"You can't remember as well as you used to, can you?"

"No, I can't," she replied; "and so I don't dare tell a thing only what I know is so."

Needless to say her evidence was not impeached.—*Boston Herald.*

A case was recently tried in Philadelphia in which a woman claimed damages of a furniture dealer for the injury done to her furniture by his men while moving.

The lady testified that the men had "slammed her things around and had been in too much of a hurry."

To a colored man in the employ of the dealer the judge put the question:

"You say that when you were handling this lady's effects you were going at a furniture mover's gait?"

"Yas, sir."

"And what is that gait?"

"Jes' keep movin', Yo' Honah, that's all."

The resourceful man is the one who succeeds. There is a deputy marshal in Alabama who does not let any such trifles as extradition laws stop him. A writer in the Washington Post tells a story of one of his achievements. When the term of court was about to begin one time a man who was out on bail was reported to be enjoying himself over in Georgia.

Deputy Jim went after him. The next day he telegraphed the judge:

"I have persuaded him to come."

A few days later he rode into town on a mule, leading his prisoner tied up snugly with a clothesline. The prisoner looked as if he had seen hard service.

"Why, Jim!" exclaimed the judge. "You didn't make him walk all the way from Georgia, did you?"

"No, sir," replied Jim.

"I thought not," said the judge.

"No," responded Jim. "Part of the way I drug him, and when we come to the Tallapoosa river he swum."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACCIDENT INSURANCE—Burden of Proof in Action Fidelity Bond.—In an action on a fidelity bond the burden is upon defendant to prove breach of the conditions of the bond, and not on plaintiff to prove compliance therewith.—T. M. Sinclair & Co. v. National Surety Co., Iowa, 107 N. W. Rep. 184.

2. ACCIDENT INSURANCE — Notice of Accident. — The failure of an insured in an accident policy to give immediate notice of an accident, as required by the terms of the policy, held not to have been waived by the insurer. —Travelers' Ins. Co. v. Nax, U. S. C. C. of App., Third Circuit, 142 Fed. Rep. 653.

3. ACCOUNT—Decree.—Where a report was an accounting and a finding of a liability by plaintiff to defendant, and the petition prayed an accounting, and there was no evidence that plaintiff had tendered the amount found due, a decree requiring him to pay the same to the defendants was proper.—Linder v. Whitehead, Ga., 58 S. E. Rep. 588.

4. ADMIRALTY—Libel in Personam.—Remedy *in personam*, given by general admiralty rule No. 19, extends to one who has direct pecuniary interest in the property saved.—United States v. Cornell Steamboat Co., U. S. S. C., 26 Sup. Ct. Rep. 648.

5. ADVERSE POSSESSION—Permissive Occupancy.—In an action by an unincorporated religious society to quiet title, regular attendance by defendant's ancestor on divine worship in a meetinghouse built by plaintiff on the land and occupied by it held not to constitute a user in common with plaintiff.—First Baptist Church of Sharon v. Harper, Mass., 77 N. E. Rep. 778.

6. AGRICULTURE—Liens —Though return of an officer seeking to levy on crops for a laborer's lien shows an unlawful attempt to seize immature crops, it is no reason for treating the return as a levy where he also levied on other property to enforce his general lien.—Faircloth v. Webb, Ga., 58 S. E. Rep 592.

7. ALIENS—Deportation.—Second hearing before board of special inquiry, resulting in a deportation of certain aliens, could be directed by secretary of commerce and labor acting under authority conferred on him by Act March 3, 1903, ch. 1012, § 21, 32 Stat. 1218 [U. S. Comp. St. Supp. 1905, p. 284] —Pearson v. Williams, U. S. S. C., 26 Sup. Ct. Rep. 608.

8. APPEARANCE—Defects in Pleading. — A defendant summoned in to defend a bill not originally framed to include him waives by appearance and joinder of issue by an answer to the merits any defects of form in such bill.—First Baptist Church of Sharon v. Harper, Mass., 77 N. E. Rep. 778.

9. ATTORNEY AND CLIENT—Marriage Annulment —On the hearing of a motion to set aside a judgment annulling a marriage, the respective parties held required to appear by their individual counsel, and not by one counsel representing both parties.—Johnson v. Johnson, N. Car., 58 S. E. Rep. 623.

10. ATTORNEY AND CLIENT—Right to Retainer.—The right of attorneys to charge a retaining fee in addition to charges for ordinary services is not limited to cases of express stipulation for retainer.—Blair v. Columbian Fireproofing Co., Mass., 77 N. E. Rep 762.

11. APPEAL AND ERROR—Admissibility of Evidence.—Phrase in question propounded to witness held to constitute a mere assertion of counsel, which he had no right to make, so that any error in ruling of court thereon was without injury —W. K. Syson Timber Co. v. Dickens, Ala., 40 So. Rep. 758.

12. APPEAL AND ERROR—Assignment of Error.— Assignment of error in the admission of evidence cannot be considered where it is not shown that objections, if any, were urged when the evidence was admitted.—Bowden v. Bowden, Ga., 58 S. E. Rep 606.

13. APPEAL AND ERROR—Bill of Exceptions —A bill of exceptions to make the evidence part of the record must incorporate or have annexed to it the evidence, or contain a sufficient description of such evidence, otherwise it is no part of the record.—Woods v. King, W. Va., 58 S. E. Rep. 605.

14. APPEAL AND ERROR—Concurrent Finding of Facts. —A concurrent finding of two lower courts on the question of fact on which conclusion of court is rested will not be disregarded by Supreme Court of United States on appeal.—Darlington v. Turner, U. S. S. C., 26 Sup. Ct. Rep. 630.

15. APPEAL AND ERROR—Interlocutory Decree.—When an appealable interlocutory decree is rendered, and subsequent decrees carrying out the principles settled and are entered, an appeal from the interlocutory decree alone will not bring up for review such subsequent decrees.—Hopkins v. Prichard, W. Va., 58 S. E. Rep. 567.

16. APPEAL AND ERROR — Nonperformance of Covenant.—Heirs of a grantor, held not entitled to complain of the grantee's nonperformance of his covenant to maintain the grantor.—Harwood v. Shoe, N. Car., 58 S. E. Rep. 616.

17. BANKRUPTCY—Ancillary Proceedings.—A district court has no ancillary jurisdiction, to make a summary order, on the application of the trustee of a bankrupt whose estate is being administered in another district, requiring a person to turn over property to the trustee.—*In re* Von Hartz, U. S. C. C. of App., Second Circuit, 142 Fed. Rep. 726.

18. BANKRUPTCY—Attorney's Fees. — Bankr. Act, ch. 541, § 64b, cl. 3, does not authorize the allowance of attorney's fees on account during the administration of an estate on petition of the attorneys, and without notice to the parties interested.—*In re* Young, U. S. D. C., E. D. N. Car., 142 Fed. Rep. 891.

19. BANKRUPTCY—Debts Entitled to Priority.—An indebtedness of a bankrupt to a county of Maryland for county taxes collected by him as county tax collector and not accounted for is not one entitled to priority, as "taxes" legally due and owing to the county.—*In re* Waller, U. S. D. C., D. Md., 142 Fed. Rep. 886.

20. BANKRUPTCY—Effect of Admitted Insolvency.— When the act of bankruptcy alleged against a corporation is an admission in writing of its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground, the question of its insolvency is immaterial. —*In re* Duplex Radiator Co., U. S. D. C., S. D. N. Y., 142 Fed. Rep. 906.

21. BANKRUPTCY—Homestead Exemption.—The fact that a bankrupt, through ignorance of the law, failed to schedule real estate standing in the name of his deceased wife, of which he was tenant by the curtesy, and which was occupied by him and his children as a homestead, or to claim his right of exemption therein, does not preclude the court from allowing him to amend his schedule and assert his claim.—*In re* Kaufman, U. S. D. C., E. D. Wis., 142 Fed. Rep. 898.

22. BANKRUPTCY—Partnership.—A partnership is insolvent and subject to adjudication as a bankrupt when the partnership property is insufficient to pay its debts, regardless of the individual property of the partners.—*In re* McMurtrey & Smith, U. S. D. C., W. D., Tex., 142 Fed. Rep. 853.

23. BANKRUPTCY—Preferential Payments.—Payment of a note by a bankrupt after insolvency held not to be a preference which the creditor was required to surrender before proving its claim, where after the note was given, but before its maturity and payment, new credits had been given without knowledge of the insolvency, and the net result of the entire transactions was to increase the bankrupt's estate.—*In re* Watkinson, U. S. D. C., E. D. Pa., 142 Fed. Rep. 782.

24. BANKRUPTCY—Right to Intervene.—A debtor sued by a trustee in bankruptcy is not a party in interest in the bankruptcy proceedings, nor entitled by reason of his interest in the suit to intervene therein and be heard for any purpose.—*In re* Sully, U. S. D. C., S. D. N. Y., 142 Fed. Rep. 895.

25. BANKRUPTCY—Surrender of Preferences.—Bankr. Act ch. 541, § 57g, requires a creditor as a condition to the proof of his claim to surrender a preference only when he had reasonable cause to believe that it was intended as a preference, or a conveyance or transfer to him only when it was made by the bankrupt with a fraudulent intent.—*In re* Bloch, U. S. C. C. of App., Second Circuit, 142 Fed. Rep. 674.

26. BANKS AND BANKING—Ultra Vires Acts.—Want of authority in national bank to become absolute owner in satisfaction of a debt of shares represented by transferable certificates in a partnership is a valid defense to an action against it founded on its liability for partnership debts.—Merchants' Nat. Bank v. Wehrmann, U. S. S. C., 26 Sup. Ct. R. p. 613.

27. BENEFIT SOCIETIES—Presumption as to Suicide.—Upon an issue as to whether or not an insured committed suicide, where he was found dead under circumstances showing clearly that he killed himself, there is no presumption that his death was accidental.—Supreme Tent Knights of Maccabees of the World v. King, U. S. C. C. of App., Sixth Circuit, 142 Fed. Rep. 678.

28. BENEFIT SOCIETIES—Waiver of Benefits.—A mutual benefit society held not estopped from relying upon a waiver of liability in case death should result from a certain cause.—Knights and Ladies of Columbia v. Shoaf, Ind., 77 N. E. Rep. 738.

29. BENEFIT SOCIETIES—Warranties as to Health.—Where, in an action to recover on a life insurance policy, the court charged that the statements of deceased as to his health were a warranty, it is competent for the jury to consider the admissions of the officers of the insurance order as to the cause of death.—Ranta v. Supreme Tent, Knights of the Maccabees of the World, Minn., 107 N. W. Rep. 156.

30. CARRIERS—Failure to Transport Cotton.—Where, in an action against a carrier for failure to transport cotton with reasonable dispatch, it admitted that its equipment was insufficient to handle the annual business, an allegation that its business had been extraordinary for the year in question held immaterial.—Yazoo & M. V. R. Co. v. Blum Co., Miss., 40 So. Rep. 748.

31. CARRIERS—Limitation of Liability.—A common carrier of goods cannot limit its liability for the loss of goods by a condition inserted in the bill of lading, unless it was known to the shipper, and either expressly or impliedly assented to by him.—Baltimore & O. R. Co. v. Doyle, U. S. C. C. of App., Third Circuit, 142 Fed. Rep. 669.

32. CARRIERS—Rates Scheduled With Interstate Commerce.—A common carrier may exact regular rate for interstate shipments, as shown by printed schedules on file within the interstate commerce commission and posted within in the stations of such carrier.—Texas & P. Ry. Co. v. Mugg & Dryden, U. S. S. C., 26 Sup. Ct. Rep. 628.

33. CARRIERS—Separation of Races.—Posting a sign in street car indicating that different parts of the car were to be used by white and colored persons respectively held not a sufficient compliance with Laws 1904, p. 140, ch. 99.—Waldauer v. Vicksburg Ry. & Light Co., Miss., 40 So. Rep. 751.

34. CONSTITUTIONAL LAW—Executive Powers.—Courts have no power to interfere with discretion of governor in ordering an election for the creation of a new county, under Const., art. 7, § 1.—Lamar v. Croft, S. Car., 53 S. E. Rep. 540.

35. CONSTITUTIONAL LAW — Ordinance Compelling Transfers on Street Railroad.—A city ordinance, requiring a street railroad company to accept transfers issued to passengers by other companies in no way connected with it, and to carry such passengers over its line without charge, is unconstitutional as depriving it of its property without due process of law.—Chicago City Ry. Co. v. City of Chicago, U. S. C. C., N. D. Ill., 142 Fed. Rep. 844.

36. CONTRACTS—Offers of Compromise as Evidence.—Where the issue is whether or not defendant entered into the contract declared on, plaintiff cannot make proof of admissions of liability thereunder made by defendant pending negotiations for a settlement.—Wall v. Moulton, Ga., 53 S. E. Rep. 591.

37. COPYRIGHTS—Copyright by Assignee of Author.—The assignee of the copyright of a painting may obtain a statutory copyright thereon, although not the owner of the painting itself.—Werckmeister v. American Lithographic Company, U. S. C. C., S. D. N. Y., 142 Fed. Rep. 827.

38. COPYRIGHTS—Infringement.—Replevin cannot be availed of to seize prints, alleged to infringe plaintiff's copyright, for the sole purpose of using them in evidence in a suit for penalties under Rev. St., § 4965 [U. S. Comp. St. 1901, § 3414].—Hills & Co. v. Hoover, U. S. C. C., E. D. Pa., 142 Fed. Rep. 904.

39. CORPORATIONS—Conducting Illegal Business.—The officers and stockholders of a corporation who caused the business of dentistry to be conducted in its name in violation of the laws of the state held liable as partners for an injury to a patient through unskillful treatment by an authorized employee.—Mandeville v. Courtright, U. S. C. C. of App., Third Circuit, 142 Fed. Rep. 97.

40. CORPORATIONS—Defective Organization.—The allegations of a petition, disclosing that defendants were conducting business as commercial partners in the name of a mercantile company, limited, and falsely claimed to be a corporation, held to show a cause of action, and not to disclose the organization of such a corporation, as is contemplated by Acts 1904, p. 281, No. 120, validating the charters of corporations irregularly organized.—Provident Bank & Trust Co. v. Saxon, La., 40 So. Rep. 778.

41. CORPORATIONS—Mortgages.—The omission of a seal from a mortgage made by a business corporation is not fatal to its validity in equity, under the constitution and laws of Arkansas.—Fouth Nat. Bank v. Camden Lumber Co., U. S. C. C., W. D. Ark., 142 Fed. Rep. 257.

42. CORPORATIONS—Organization and Assumption of Contract.—A corporation can assume the obligations of a contract made before its organization, or make a new contract concerning the same subject matter with the parties to the original agreement.—Wasser v. Western Land Securities Co., Minn., 10. N. W. Rep. 160.

43. CORPORATIONS — Partnership — Where the only facts alleged as to the organization of a corporation are that there was a notarial charter recorded, there is no basis for the contention that the petition admits the organization of the corporation either *de jure* or *de facto*.—Louisiana Nat. Bank v. Henderson, La., 40 So. Rep. 779.

44. CORPORATIONS—Powers of Directors. — The fact that by a contract between a corporation and another the latter is to name the directors to be elected by the corporation does not affect the powers of such directors to act in all matters in behalf of the corporation after their election.—Massachusetts Const. Co. v. Kidd, U. S. C. C., D. Mass., 142 Fed. Rep 285.

45. CORPORATIONS—Receivership.—The property of a solvent corporation for which receivers had been appointed at suit of stockholders, on account of fraudulent management, restored to the corporation in accordance with the wishes of a great majority of the stockholders.—Tolman v. Ubero Plantation Co., U. S. C. C., D. Mass., 142 Fed. Rep. 270.

46. CORPORATIONS—Revocation of License.—A state may provide by legislation that, if a foreign insurance company shall remove a case commenced in a state court or federal court, its license to do business in the state may be revoked.—Security Mut. Life Ins. Co. v. Prewitt, U. S. S. C., 26 Sup. Ct. Rep. 619.

47. CORPORATIONS—Validity of Deed Executed in Corporate Name.—A deed executed in corporate name and under corporate seal, duly delivered, carries with it the presumption of authority in the officers.—Deepwater

Council No. 40, O. U. A. M. of Mt. Carbon v. Renick, W. Va., 53 S. E. Rep. 553.

48. CRIMINAL LAW—Bill of Exceptions.—It has been the constant practice of the district judges to mention in the *per curiam* statement made in bills of exception facts occurring after the ruling complained of which would show that the ruling, if erroneous, was harmless or had been waived.—State v. Goodson, La., 40 So. Rep. 771.

49. CRIMINAL LAW—Order of Proof.—Attempt of court to control order of introduction of testimony held error.—Brown v. State, Miss., 40 So. Rep. 737.

50. CRIMINAL LAW—Record on Appeal.—Where the requirements of the law as to making the brief of the evidence has been utterly disregarded, an assignment that the verdict was contrary to the law and the evidence cannot be considered.—Jones v. State, Ga., 53 S. E. Rep. 588.

51. CRIMINAL TRIAL—Aiding and Abetting Crime.—In a prosecution for aiding and abetting a criminal offense, the commission of the offense by the principal and his criminal intent are fundamental issues, and are provable primarily without reference to connection with the defendant.—Brown v. United States, U. S. C. C. of App., Seventh Circuit, 142 Fed. Rep. 1.

52. CRIMINAL TRIAL—Appearance Bond.—On trial for murder the admission of an appearance bond executed by accused on a charge of having sometime before the homicide attempted to kill the murdered party, in order to prove motive, was not error.—State v. Goodson, La., 40 So. Rep. 771.

53. CRIMINAL TRIAL—Certiorari.—Though the supervisory jurisdiction of the supreme court, under Const. 1898, art. 101, extends over criminal cases, it will not exercise the same by *certiorari*, unless necessary to prevent an evident denial of justice.—State v. Summerlin, La., 40 So. Rep. 792.

54. CRIMINAL TRIAL—Exclusion of Witnesses.—Complaint that a person was permitted to testify who remained in the court room while other parties were testifying in violation of the court's orders, held no ground for reversal, where he was not originally summoned by the state, nor put under the rule.—State v. Goodson, La., 40 So. Rep. 771.

55. CURTESY—Conveyance by Husband to Wife.—The right of a husband to hold land of his deceased wife during his lifetime as tenant by the curtesy, expressly given by Rev. St. Wis. 1898, § 2180, is not affected by the fact that such land was conveyed by the husband by general warranty deed to one who afterwards conveyed to the wife.—*In re* Kaufmann, U. S. D. C., E. D. Wis., 142 Fed. Rep. 898.

56. CUSTOMS DUTIES—Confusion of Goods Subject to Different Rates.—Failure to prove the identity of part of an importation which is subject to a lower rate of duty than the remainder precludes the differentiation as to such part, and all must be treated alike.—J. B. Ellison & Sons v. United States, U. S. C. C. of App., Third Circuit, 142 Fed. Rep. 732.

57. CUSTOMS DUTIES—Enforcement of Penalty in Redelivery Bond.—Enforcement of penalty in redelivery bond taken by collector under authority of Rev. St. U. S., § 2899 [U. S. Comp. St. 1901, p. 1921], for the nonreturn, unopened, of a required package of imported merchandise, held not precluded by Rev. St. U. S., § 961 [U. S. Comp. St. 1901, p. 699.—United States v. Dieckerhoff, U. S. S. C., 26 Sup. Ct. Rep. 604.

58. DRAINS—Assessment of Benefits.—After a board of drainage commissioners has assessed benefits to lands, proceeding in all things in accordance with the statutory requirements, its action is final unless assailed for fraud or other ground for equitable interference.—State v. Fisk, N. Dak., 107 N. W. Rep. 191.

59. EASEMENTS—Right of Way on Farm.—Owner of farm lands subject to private right of way may inclose the lands, using gates, if they do not constitute an unreasonable burden on the easement.—Watson v. Hoke, S. Car., 53 S. E. Rep. 537.

60. EMINENT DOMAIN—Discretion of City in Widening Street.—The question of widening a street is within the sound discretion of the municipal authorities, with which neither an owner whose land is to be taken nor the courts can interfere.—City of Durham v. Rigsbee, N. Car., 53 S. E. Rep. 531.

61. ENTRIES—Evidence.—Entries in record book of unincorporated religious society held admissible in evidence, in action involving title to land, to show its organization and a vote taken to purchase such land and to erect a church thereon.—First Baptist Church of Sharon v. Harper, Mass., 77 N. E. Rep. 778.

62. EQUITY—Dismissing Bill Without Prejudice.—Where a bill to remove cloud is answered and replication filed, and the cause is heard on the pleadings and is such that the merits cannot be passed upon in the absence of evidence, it is within the discretion of the court to dismiss the bill without prejudice.—Meffert v. Thomas, Fla., 40 So. Rep. 764.

63. EQUITY—Fiduciary Relations.—Where fiduciary relations existed between testator and one who had cared for his property and who was directed by will to distribute the proceeds among minor legatees, a court of equity is the proper forum to seek relief from alleged wrongful transfer thereof.—Darlington v. Turner, U. S. S. C., 26 Sup. Ct. Rep. 630.

64. ESTOPPEL—Burden of Proof.—Where a party pleads an estoppel, the burden of proof is on him to establish the facts on which it is based.—Parkins v. Missouri Pac. Ry. Co., Neb., 107 N. W. Rep. 260.

65. EVIDENCE—Letterpress Copies of Letters.—Letterpress copies of letters held inadmissible in absence of showing that originals were not in existence and could not be produced.—Menasha Wooden Ware Co. v. Harmon, Wis., 107 N. W. Rep. 299.

66. EVIDENCE—Letter Written by Third Person.—The contents of a letter written to a plaintiff by a third person not connected with defendant, which purports to contain a statement made to the writer by defendant, are inadmissible as hearsay.—Security Trust Co. v. Robb, U. S. C. C. of App., Third Circuit, 142 Fed Rep. 78.

67. EVIDENCE—Opinions.—The opinion of a witness as to the amount of damages resulting from defendant's wrong, where no facts are stated as a basis for the estimate is incompetent.—Raymond v. Edelbrock, N. Dak., 107 N. W. Rep. 194.

68. EVIDENCE—Rated Capacity.—The rated capacity of the boiler of a heating plant was a proper subject of expert inquiry.—United States Heater Co. v. Jenss, Wis., 107 N. W. Rep. 293.

69. EXECUTORS AND ADMINISTRATORS—Relationship as Affecting Claims Against Estate.—Where plaintiff, his wife, and children rendered services for deceased at his request, the fact that the wife was deceased's daughter did not rebut the legal implication that deceased agreed to pay for such services.—Dunn v. Currie, N. Car., 53 S. E. Rep. 533.

70. EXECUTORS AND ADMINISTRATORS—Suit in Foreign Jurisdiction.—The right of an administrator to maintain a suit in another state to recover assets alleged to have been surreptitiously removed to such state by defendants prior to the death of decedent is dependent entirely on the laws of the state where the suit is brought.—Graham v. Lybrand, U. S. C. C. of App., Seventh Circuit, 142 Fed. Rep. 109.

71. FACTORS—Nature of Employment—A person having possession and absolute control of merchandise shipped to him to sell and collect the price is a commission merchant, and not a broker.—T. M. Sinclair & Co. v. National Surety Co., Iowa, 107 N. W. Rep. 184.

72. FEDERAL COURTS—Error to State Court.—That chief justice of highest state court allowed a writ of error from Supreme Court of United States does not help out failure of record to show federal question raised.—Hulbert v. City of Chicago, U. S. S. C., 26 Sup. Ct. Rep. 617.

73. FEDERAL COURTS—Jurisdiction.—Service of process on an officer of a foreign corporation which had no place

of business in the state, the officer being there temporarily when served, held not to give the court jurisdiction of the corporation.—Buffalo Glass Co. v. Manufacturer's Glass Co., U. S. C. C., W. D. N. Y., 142 Fed. Rep. 273.

74. FEDERAL COURTS—Jurisdiction of District Court.—Suit to recover from United States for salvage of duties on cargo of sugar afterwards saved from loss by fire while on board lighter in possession of custom house officers, held founded on authority of Rev. St. U. S., §§ 2984, 3689 [U. S. Comp. St. 1901, pp. 1958, 2460], authorizing refund of duties if property has been destroyed by fire.—United States v. Cornell Steamboat Co., U. S. S. C., 26 Sup. Ct. Rep. 648.

75. FRAUDS, STATUTE OF—Memorandum as to Sale of Land.—Vendor's execution of deed and written communication to vendee that he has deposited the price in bank for delivery held not to satisfy Laws Okla. 1897, ch. 8, § 4, providing that no contract for real estate shall be valid unless in writing.—Halsell v. Renfrow, U. S. S. C., 26 Sup. Ct. Rep. 610.

76. FRAUDULENT CONVEYANCES—Liabilities of Purchaser.—To charge land with grantor's debts, as conveyed in fraud of creditors, it must be shown that the purchaser had knowledge of the grantor's fraudulent intent.—R. M. Sutton & Co. v. Christie, W. Va., 53 S. E. Rep. 602.

77. GAMING—Evidence.—On a trial for gaming, evidence that "this gambling took place the same night E was killed at Mann Cox's held irrelevant, and tended to prejudice the accused.—Fleming v. State, Ga., 53 S. E. Rep. 579.

78. HABEAS CORPUS—Substitute for Writ of Error.—*Habeas corpus* will not be granted by the Supreme Court of the United States on conviction in district court for bringing liquors into Indian country, unless there are special circumstances rendering remedy by writ of error inexpedient.—*In re* Lincoln, U. S. S. C., 26 Sup. Ct. Rep. 602.

79. HIGHWAYS—Establishment of Prescription.—To establish a highway by prescription, there must be a user by the general public, under a claim of right, adverse to the owner of the land.—Nelson v. Sneed, Neb., 107 N. W. Rep. 255.

80. HOMICIDE—Evidence.—In a prosecution for homicide, exclusion of evidence of whereabouts of negro women about whom a previous difficulty between deceased and defendant had occurred held erroneous.—Brown v. State, Miss., 40 So. Rep. 787.

81. HOMICIDE — Instructions.— Where the killing is shown to have been done with a deadly weapon, and defendant relies on accidental killing, the court should instruct the jury, presenting both theories if asked to do so.—State v. Legg, W. Va., 53 S. E. Rep. 545.

82. INFANTS—Custody. — Where a young child was placed with plaintiff society by the court, as authorized by Acts 1894, No. 79, and the society found a home, as it thought, temporarily, and the child desires to remain in her new home, and is not now within the jurisdiction of the court which placed her with the society, the court in whose jurisdiction she is at present has jurisdiction to decide the differences which have arisen.—Louisiana Soc. for Prevention of Cruelty to Children v. Tyler, La., 40 So. Rep. 784.

83. INFANTS—Judgment Against.—A judgment against a minor defendant properly served and represented will not be set aside on account of the minority unless the action for that purpose is commenced within one year after the minor arrives at the age of 21 years as provided in section 442 of the Code of Civil Procedure.—McCreary v. Creighton, Neb., 107 N. W. Rep. 240.

84. INFANTS—Process of Service.—In ordinary suits against minors and insane persons, the only service required is that made in the usual way on the minor or insane person.—McKenna v. Garvey, Mass., 77 N. E. Rep. 782.

85. INJUNCTION—Contempt.—Where the court issuing an injunction alleged to be violated had no jurisdiction of the subject-matter, the restraining order was void, and no contempt could be predicated of its disregard.—United States v. Atchison, T. & S. F. Ry. Co., U. S. C. C., W. D. Mo., 142 Fed. Rep. 176.

86. INJUNCTION — Parties in Interest. — Citizens of a county may sue to enjoin commissioners appointed by the governor to have surveys made for the proposed new county when acting under such appointment.—Lamar v. Croft, S. Car., 53 S. E. Rep. 540.

87. INJUNCTION—Writ of Possession.—The execution of a writ of possession will be enjoined at the suit of a person in possession who was not a party to the suit and does not claim title thereto or possession thereof under any party to such suit.—Bennett v. Preston, W. Va., 53 S. E. Rep. 562.

88. INSANE PERSONS—Effect of an Appeal.—An appeal by a person adjudged to be insane suspends the judgment of the ordinary ordering him to be committed to the state sanitarium, and the superintendent thereof cannot rely on the judgment as authorizing the confinement of the appellant.—Reagan v. Powell, Ga., 53 S. E. Rep. 580.

89. INSANE PERSONS—Right to Sue and Defend.—An insane person, at least when not under guardianship, may prosecute and defend an action by an attorney, and will be bound by the result.—McKenna v. Garvey, Mass., 77 N. E. Rep. 782.

90. INTEREST—Definite Term of Credit.—Where goods are sold on a definite term of credit, the account bears interest from the expiration of such term, and unless there are matters in dispute or deductions or discounts to be adjusted, no demand is necessary.—Harding, Whitman & Co. v. York Knitting Mills, U. S. C. C., M. D. Pa., 142 Fed. Rep. 228.

91. INTOXICATING LIQUORS — Consent to License.—A written record of an order of a city council consenting to grant a license to sell intoxicating liquors must be produced to show such consent, or its absence accounted for.—Devanney v. Hansen, W. Va., 53 S. E. Rep. 603.

92. JUDGMENT—Collateral Attack.—A judgment in partition, unappealed from, fixing the shares of the interested parties, and making partition, is final, and the parties thereto are estopped from claiming a greater interest.—Staats v. Wilson, Neb., 107 N. W. Rep. 280.

93. JUDGMENT—Interlocutory Decree.—A decree awarding a perpetual injunction in copyright infringement proceedings and referring the cause to a master for an accounting held interlocutory and not *res judicata* as to any issues involved.—Hills & Co. v. Hoover, U. S. C. C., E. D. Pa., 142 Fed. Rep. 904.

94. JUSTICES OF THE PEACE—Docket Entries.—That a justice's docket should establish the invalidity of his judgment, it must fail to disclose some facts essential to jurisdiction which the statute requires to be entered upon the docket.—McGeehan v. Bedford, Wis., 107 N. W. Rep. 296.

95. LIBEL AND SLANDER—Limited Privilege.—A party or his counsel cannot avail himself of his situation to gratify private malice in his pleadings, but, subject to this restriction, it is for the public interest to allow a party or his counsel some latitude in making allegations and some freedom of speech in conducting his case.—Dunn v. Southern Ins. Co., La., 40 So. Rep. 756.

96. LIFE INSURANCE—Effect of Receipt of Premiums After Lapse.—A receipt by an insurer in a life policy of premiums after the lapse of the policy for nonpayment is a waiver.—McNicholas v. Prudential Ins. Co., Mass., 77 N. E. Rep. 756.

97. LIFE INSURANCE—Suit for Accounting as to Surplus Funds.—A policy holder in a life insurance company, entitled by his contract to share in its surplus, but which is controlled by its stockholders, cannot maintain a suit in equity against it for an accounting and the appointment of a receiver, based on the alleged mismanagement and misappropriation of its funds by its officers.—Brown v. Equitable Life Assur. Soc., U. S. C. C., S. D. N. Y., 142 Fed. Rep. 835.

98. LIMITATION OF ACTIONS—Amendment of Pleadings.—Original bill in action to redeem land from sale under deed of trust held not sufficient to raise objections specifically stated by amended bill.—Cox v. American Freehold & Land Mortg. Co., Miss., 40 So. Rep. 789.

99. LIS PENDENS—Rights of Vendee.—The title vested in a vendee under an unrecorded contract for the sale of lands before the filing of a notice of *lis pendens* held not injuriously affected by that notice.—Moulton v. Kolodzik, Minn., 107 N. W. Rep. 154.

100. MARRIAGE—Action to Set Aside Annulment.—Where either party desires to set aside a judgment annulling a marriage, it must be done in an adversary proceeding, with notice served on the other party.—Johnson v. Johnson, N. Car., 58 S. E. Rep. 623.

101. MASTER AND SERVANT—Defective Appliances.—Whether the defective and unsafe condition of a derrick was the proximate cause of injuries to plaintiff, an employee, held a question for the jury.—Butler v. New England Structural Co., Mass., 77 N. E. Rep. 764.

102. MASTER AND SERVANT—Fellow Servants.—A petition alleging that one servant was injured by the negligent act of another servant engaged under a common employment discloses no cause of action against the master.—Weaver v. W. L. Goulden Logging Co., La., 40 So. Rep. 798.

103. MASTER AND SERVANT—Injury to Employee on Hand Car.—Section foreman in charge of hand car held not a conductor within Const. § 193, relating to effect of knowledge of railroad employees as to defects in appliances.—Yazoo & M. V. R. Co. v. Parker, Miss., 40 So. Rep. 746.

104. MASTER AND SERVANT—Negligence.—On a trial of an action against a railroad company by a locomotive fireman for injuries received by an alleged defect in locomotive, an instruction that, to overcome the *prima facie* evidence of negligence, defendant must satisfy the jury by a preponderance of evidence that it was not negligent, is erroneous.—Klunk v. Hocking Valley Ry. Co., Ohio, 77 N. E. Rep. 752.

105. MASTER AND SERVANT—Negligence of Fellow Servants.—The civil-law doctrine that a master without fault is liable for the negligence of a fellow servant is not recognized by the Civil Code nor jurisprudence of Louisiana.—Weaver v. W. L. Goulden Logging Co., La., 40 So. Rep. 798.

106. MASTER AND SERVANT—Unsafe Place to Work.—A master is liable for the injury of a servant resulting from his being put to work in an unsafe place, which had been deliberately arranged by the foreman in authority, who did not notify the workman of the danger.—Brown v. Baltimore & O. R. Co., U. S. C. C., E. D. Pa., 142 Fed. Rep. 911.

107. MECHANICS' LIENS—Labor With Consent of Owner.—Labor performed by one under contract with a contractor for a building held performed by the owner's consent, within the statute relating to mechanics' liens.—McCormack v. Butland, Mass., 77 N. E. Rep. 761.

108. MORTGAGES—Action to Redeem.—Action to redeem from sale under trust deed held not barred by laches where commenced on the last day before expiration of limitations.—Cox v. American Freehold & Land Mortg. Co., Miss., 40 So. Rep. 789.

109. MORTGAGES—Foreclosure.—A mortgagor's possession of mortgaged premises after foreclosure will not become adverse until notice that he is holding in hostility to purchaser.—Tainter v. Abrams, Neb., 107 N. W. Rep. 225.

110. MORTGAGES—Stock of Merchandise.—Under the laws of Arkansas, a mortgage on a stock of merchandise which is left in control of the mortgagor to be sold in the usual course of business is invalid.—Fourth Nat. Bank v. Camden Lumber Co., U. S. C. C., W. D. Ark., 142 Fed. Rep. 257.

111. MUNICIPAL CORPORATIONS—Injury Caused by Defective Streets.—In an action for injuries caused by defect in street, demurrer to plea that plaintiff knew or should have known of the defect held properly overruled.—City Council of Montgomery v. Reese, Ala., 40 So. Rep. 760.

112. MUNICIPAL CORPORATIONS—Real and Personal Property.—Acts 1880, p. 180, No. 133, and Acts 1884, p. 89, No. 67, in so far as they directed the city of New Orleans to transfer to the board of liquidation of the city debt all of the property of said city not dedicated to public use, were not superseded by Acts 1890, p. 144, No. 110.—Board of Liquidation of the City Debt v. City of New Orleans, La., 40 So. Rep. 781.

113. MUNICIPAL CORPORATIONS—Rules for Procedure of City Council.—City council of a city of the first class has power by ordinance to establish rules for its own government in matters of procedure.—State v. Dunn, Neb., 107 N. W. Rep. 236.

114. NEGLIGENCE—Burden of Proving Contributory Negligence.—In the federal courts, contributory negligence is a defense, and the burden of proof upon the issue rests on the defendant.—Armour & Co. v. Carlas, U. S. C. C. of App., Second Circuit, 142 Fed. Rep. 721.

115. NEGLIGENCE—Premises Abutting on Highway.—Owners of land adjoining a highway and separated therefrom by a wall held not bound to build a railing on the wall to prevent people from falling off the highway on to their premises.—Schimberg v. Cutler, U. S. C. C. of App., Sixth Circuit, 142 Fed. Rep. 701.

116. NOVATION—Definition.—Novation is the substitution of one debtor by mutual agreement for another, whereby the old debt is extinguished.—Chenoweth v. National Bldg. Ass'n, W. Va., 58 S. E. Rep. 559.

117. NUISANCE—Abolition of Private Franchise.—The abolition by the governor of Cuba, during its occupation by the United States, of an exclusive franchise owned by plaintiff and granted by the Spanish government to slaughter cattle in the city of Havana, held not authorized as an exercise of the police power.—O'Reilly De Camara v. Brooke, U. S. D. C., S. D. N. Y., 142 Fed. Rep. 858.

118. NUISANCE—Declaration in Action for Damages.—A declaration in an action to recover damages for the maintenance of a nuisance is sufficient where it does not allege the nuisance to be a public one, and avers special and peculiar injury resulting therefrom to plaintiff by reason of its proximity to his dwelling.—Roessler Hasslacher Chemical Co. v. Doyle, U. S. C. C. of App., Third Circuit, 142 Fed. Rep. 118.

119. NUISANCE—Suit for Abatement.—Where an owner of property cannot use the same at all without indirectly injuriously affecting the property of another, the sound discretion of a court of equity is invoked when it is appealed to and asked to abate such use as a nuisance.—Mountain Copper Co. v. United States, U. S. C. C. of App., Ninth Circuit, 142 Fed. Rep. 625.

120. PARENT AND CHILD—Custody of Child.—An award of the custody and control of a minor 14 years old to one who had charge of her from her birth held not an abuse of discretion as against her father.—Willingham v. Mattox, Ga., 58 S. E. Rep. 607.

121. PARENT AND CHILD—Custody of Infant's Estate.—Plenary power conferred on father by Civ. Code La. 1870, arts. 221, 223, 236, to administer estate of minor children during marriage, held not controlled or modified by article 3350, providing for inventory before fathers and mothers shall be allowed to take possession of property belonging to their minor children.—Darlington v. Turner, U. S. S. C., 26 Sup. Ct. Rep. 630.

122 PHYSICIANS AND SURGEONS—Exemplary Damages.—Exemplary damages are recoverable from defendants, who in conducting the business of dentistry caused plaintiff to be operated on by an employee who was unlicensed as a dentist, and through whose negligence and want of skill she suffered a severe injury.—Mandeville v. Courtright, U. S. C. C. of App., Third Circuit, 142 Fed. Rep. 97.

123. PLEADING—Alternative Pleadings.—In an action for personal injuries, a complaint averring that the act

was "willfully or wantonly done" held not demurrable because the averment was in the alternative.—Mobile, J. & K. C. R. Co. v. Smith, Ala., 40 So. Rep. 763.

124. PLEADING—Amendment After Evidence is In —It is within the discretion of the trial court to refuse to allow defendants to amend their answer at the close of the evidence; being no showing as to why the amendment was not offered earlier.—Kettering v. Eastlake, Iowa, 107 N. W. Rep. 177.

125. PLEADING —Amendment After Verdict.— Where plaintiff alleged a cause of action in trespass *quare clausum*, but failed to prove a wrongful entry, plaintiff, in the absence of surprise to defendant, was entitledto amend after suit so as to allege a cause of action in case.—Beers v. McGinniss, Mass., 77 N. E Rep. 768.

126. PRINCIPAL AND AGENT—Authority of Agent.—An agent authorized to receive payment has no authority to commute his principal's debt for a debt due from himself to his principal's debtor nor to receive payment other than in money.—Parker v. Leech, Neb., 107 N. W. Rep. 217.

127. PRINCIPAL AND AGENT—Liability for False Representations by Agent.—Purchasers of property including standing timber held entitled to an abatement of the purchase price on the ground of false representations as to the amount of such timber knowingly made by an agent of the seller.—Kell v. Trenchard, U. S. C. C. of App , Fourth Circuit, 142 Fed. Rep. 16.

128. PUBLIC LANDS—Spanish Grant.—Where a Spanish grant was to the inhabitants of a certain town to cut down timber on lands defined as swamp lands, it cannot be determined after 100 years that lands included therein were not swamp lands at the time of the grant because at this time they are sufficiently high as to be arable lands.—Richard v. Perrodin, La., 40 So. Rep. 789.

129. QUIETING TITLE—Possession.—Under the express provisions of Rev. Laws, ch. 182, §§ 1-5, proof of plaintiff's exclusive possession of premises and seisin of an estate of freehold therein, or an unexpired term of not less than 10 years, is essential to the maintenance of a petition requiring defendant to bring suit to try the validity of the latter's title.—First Baptist Church of Sharon v. Harper, Mass., 77 N. E. Rep. 778.

130. RAILROADS — Injury at Crossing.—A pedestrian struck by a train at a crossing held not as a matter of law guilty of contributory negligence.—Garran v. Michigan Cent. R. Co., Mich., 107 N. W. Rep 284.

131. RAILROADS—Killing Dog at Crossing. — Engineer held not required to give signals at a crossing to warn a dog approaching the track.—Fowles v. Seaboard Air Line Ry., S. Car., 53 S. E. Rep. 534.

132. RAILROADS—Wanton Injury to Trespasser.—Where a complaint against a railroad company for injuries to plaintiff alleged that the injury was wanton, it was immaterial whether plaintiff was a trespasser or not.—Mobile, J & K. C. R. Co. v. Smith, Ala., 40 So. Rep. 763.

133. RECEIVERS—Appointment.—Where a husband and wife occupied a house when he filed a petition against her for a decree declaring the property to be his, and she rented the house, the court properly appointed a receiver on the part of the husband —Thompson v. Thompson, Ga., 53 S. E. Rep. 607.

134. RECEIVERS—Judgment for Sale of Property.—A judgment for sale of property by a receiver appointed in an earlier action held not invalid for want of jurisdiction over the property because there was no formal order extending the receivership.—Gila Bend Reservoir & Irrigation Co. v. Gila Water Co., U. S. S. C., 26 Sup. Ct. Rep. 615.

135. RELEASE—Validity.—The returning of an amount received under a settlement held not a condition precedent to an action on a life policy.—McNichol v. Prudential Ins. Co., Mass., 77 N. E. Rep. 756.

136. RELIGIOUS SOCIETIES—Quieting Title.—Under St. 1811, ch. 6, § 3, re enacted in St. 1834, ch. 183, § 5, and in Rev. St. 1836, ch 20, § 25, Gen. St. 1860, ch. 30, § 24, Pub. St. 1882, ch. 39, § 9, and Rev. Laws, ch. 37, § 12, a voluntary religious society possesses, for the purpose of taking, holding, and transmitting property, all the qualifying attributes of a duly organized corporation.—First Baptist Church of Sharon v. Harper, Mass., 77 N. E. Rep. 778.

137. SALES—Chattel Mortgage.—Where a contract for the sale of certain property provided for payment in cash and for a second deferred payment in cash or by assumption of a chattel mortgage, the option could be exercised by the purchasers assuming the mortgage debt, and it was no ground for a rescission that the mortgagee refused to release the seller under the mortgage.—Morris v. Persing, Neb., 107 N. W. Rep. 218.

138. SALES—Right of Rescission.—A contract for the sale and purchase of a specified quantity of yarn to be delivered in installments cannot be rescinded by the purchaser after a partial, though a defective, performance, of which the purchaser knowingly accepted the benefit.—Harding, Whitman & Co. v. York Knitting Mills, U. S. C. C., M. D. Pa., 142 Fed. Rep. 229.

139 SALES—Tender by Vendee.—Where goods tendered did not meet the requirements of the contract of sale, the vendor could refuse to accept them.—Parkins v. Missouri Pac. Ry. Co., Neb., 107 N. W. Rep. 260.

140. SALVAGE—On Duties.—Liability of federal government, as having direct pecuniary interest, for salvage on duties collected by it on sugar saved from loss by fire while on board lighter in possession of custom house officers, may be based on Rev. St. U. S. §§ 2984, 3689 [U. S. Comp. St. 1901, pp. 1958, 2460], authorizing refund of duties if property has been destroyed by fire.— United States v. Cornell Steamboat Co., U. S. S. C., 26 Sup. Ct. Rep. 648.

141. SCHOOLS AND SCHOOL DISTRICTS — Special Tax Election.—In a special election voting a special tax in aid of public schools, under Const. 1898, art. 232, the names of the taxpayers and the valuations of property were properly taken from the current assessment of the year.—Flores v. Police Jury of De Soto Parish, La , 40 So. Rep 785.

142. SIGNATURES—Use of Lead Pencil.—Signature to a check by a bank depositor by her mark in lead pencil is valid.—Drefahl v. Security Sav Bank, Iowa, 107 N. W. Rep 179.

143. SPECIFIC PERFORMANCE — Description of Property.—A description of timber lands in a contract of sale which was capable of being made certain by proof held sufficient to sustain a decree of specific performance.—Howison v. Bartlett, Ala., 40 So. Rep. 757.

144. SPECIFIC PERFORMANCE—Fraud. — Equity in an action for specific performance will rescind the contract, when asked by the purchaser, because of fraud of the vendor.—Cleavenger v. Sturm, W. Va., 53 S. E. Rep. 593.

145. SPECIFIC PERFORMANCE—Laches. — Specific performance of a contract for the sale of real estate will not be awarded at the suit of the vendee where the evidence discloses gross laches.—David Bradley & Co. v. Union Pac. Ry Co., Neb., 107 N. W Rep. 288.

146. SPECIFIC PERFORMANCE — Statute of Frauds.— There has been no such part performance as justifies specific performance of oral agreement to convey land, where all steps taken have been disputed by lessee in possession.—Halsell v. Renfrow, U. S. S. C., 26 Sup. Ct. Rep. 610.

147. STREET RAILROADS—Excessive Speed.—The running of a street car at a rate of speed in excess of that fixed by a municipal ordinance is evidence of negligence. —Davis v. Durham Traction Co , N. Car., 53 S. E. Rep. 617.

148. TAXATION—Cancellation of Tax Sale.—Cancellation of tax sale of lands made to the state and re establishing the original demand for taxes against the lands by the auditor general held unauthorized.—Auditor General v. Clifford, Mich., 107 N. W. Rep. 287.

149. TAXATION—Description of Property.—Description of land in an assessor's book by abbreviations and figures held a sufficient assessment of the land in controversy.—Bandaw v. Wolven, S. Dak., 107 N. W. Rep. 304.

150. TAXATION—Forfeiture of Commissions.—A forfeiture of the commissions of a tax collector, under Acts 1898, p. 380, No. 170, § 79, for failure to make monthly settlements, may be waived by the police jury.—Young v. Parish of East Baton Rouge, La., 40 So. Rep. 768.

151. TELEGRAPHS AND TELEPHONES—Delay in Telegram.—Complaint in action for delay in telegram held to sufficiently show that a failure to deliver the message would cause body of sender's mother to remain at station till conveyance was obtained.—Carter v. Western Union Telegraph Co., S. Car., 53 S. E. Rep. 539.

152. TENANCY IN COMMON—Adverse Possession.—Limitations do not begin to run in favor of one co tenant of land in possession against another co-tenant until actual ouster by the former, or some act on his part amounting to a total denial of the right of the latter, and until notice of the act relied on as an ouster is brought home to him.—Clark v. Beard, W. Va., 53 S. E. Rep. 597.

153. TRADE-MARKS AND TRADE-NAMES—Cigar Wrapper.—There cannot be a valid trade-mark in a cigar wrapper the only characteristics of which are that it is wider at one end than the other, and that it is of a brown color with white lettering thereon.—E. Regensburg & Sons v. Juan F. Portuondo Cigar Mfg. Co., U. S. C. C. of App., Third Circuit, 142 Fed. Rep. 160.

154. TRADE-MARKS AND TRADE-NAMES—Colored Streak in Wire Rope.—A registered trade-mark, described as consisting of "a red or other distinctively colored streak applied to or woven in a wire rope," is invalid as too broad and lacking any distinctive design.—A. Leschen & Sons Rope Co. v. Macomber & Whyte Rope Co., U. S. C. C., N. D. Ill., 142 Fed. Rep. 289.

155. TRADE-MARKS AND TRADE NAMES—Infringement.—Defendants, in a suit to restrain the infringement of a trade-name, who persisted in the infringement during the litigation, could not invoke the rule that an account of profits would not be taken where the wrongful use is accidental or without wrongful intent.—Regis v. Jaynes, Mass., 77 N. E. Rep. 774.

156. TRADE-MARKS AND TRADE NAMES—Scope of Trade-Mark.—Where a rope manufacturer adopted a blue thread twisted into one of the strands of its rope as a trade-mark, he could not restrain another manufacturer from using a thread of a different color.—Dodge Mfg. Co. v. Sewall & Day Cordage Co., U. S. C. C., D. Mass., 142 Fed. Rep. 288.

157. TRADE-MARKS AND TRADE-NAMES—Unfair Competition.—A manufacturer, without a patent, of tipped matches, is not entitled to maintain a monopoly in the use of any two particular colors to distinguish the tip from the head of the match merely because he used such colors first, and their use by another does not constitute unfair competition.—Diamond Match Co. v. Saginaw Match Co., U. S. C. C. of App., Sixth Circuit, 142 Fed. Rep. 727.

158. TRESPASS—Damages.—In an action for trespass in breaking a boom and taking some of the logs therefrom, the reasonable cost to which the plaintiff was put in using all reasonable means to reduce the damage as much as possible constituted a part of the reasonable recoverable damages.—W. K. Syson Timber Co. v. Dickens, Ala., 40 So. Rep. 753.

159. TRESPASS—Evidence.—In action for trespass to boom, certain answer to question held not responsive, and, in view of the statement of counsel propounding same, its admission was erroneous.—W. K. Syson Timber Co. v. Dickens, Ala., 40 So. Rep. 753.

160. TRESPASS—Right of Entry.—Where defendant entered plaintiff's close by her consent, he did not become a trespasser *ab initio* so as to sustain an action in trespass *quare clausum* by his subsequent misconduct in injuring the real estate.—Beers v. McGinnis, Mass., 77 N. E. Rep. 768.

161. TRIAL—Amendment of Verdict.—Where, in proceedings by a vendor against the vendee to recover possession of the real estate, the jury failed to determine the amount due complainant, it was proper for the court to amend the verdict by including the proper amount.—Gould v. Young, Mich., 107 N. W. Rep. 281.

162. TRIAL—Exceptions.—A party, by excepting to admission of evidence, held to preserve his rights without exception to the charge submitting it to the jury.—Pierson v. Boston Elevated Ry. Co., Mass., 77 N. E. Rep. 769.

163. TRIAL—Instructions as to Credibility of Witness.—Instruction that jury is not authorized to decide case on good character of any witness, but must determine the issue upon the evidence, held properly refused.—Peterman v. Henderson, Ala., 40 So. Rep. 756.

164. TRIAL—Pleadings.—Where a party answers to the merits and proceeds to trial on the theory that petition tenders a certain issue, if the pleadings can be construed to raise such issue, they will be held to do so.—Parkins v. Missouri Pac. Ry. Co., Neb., 107 N. W. Rep. 264.

165. TROVER AND CONVERSON—Receiving Proceeds of Wrongful Sale.—A person receiving the proceeds of a wrongful sale of mortgaged chattels is guilty of conversion, though he acted in good faith.—Farmer, Thompson & Helsell v. Bank of Graettinger, Iowa, 107 N. W. Rep. 170.

166. TRUSTS—Accounting by Trustee.—Estate of trustee who has failed to account for an investment in real estate will be held liable in the sum originally realized therefrom when definitely fixed.—Darlington v. Turner, U. S. S. C., 26 Sup. Ct. Rep. 630.

167. USURY—Who May Assert.—A purchaser of land charged with a usurious debt, who assumes to pay such debt in consideration of his purchase, cannot defend against the usury.—Chenoweth v. National Bldg. Assn., W. Va., 53 S. E. Rep. 559.

168. VENDOR AND PURCHASER—Rescission of Contract.—Where defendant gave plaintiff an option on certain lands, and failed to furnish an abstract as agreed, plaintiff on the breach of such covenant could rescind the contract and sue for the amount paid thereon.—Reynolds v. Lynch, Minn., 107 N. W. Rep. 145.

169. VENDOR AND PURCHASER—Tender.—A vendor cannot defend an action brought to recover part of the purchase price paid on the ground of failure of the vendee to tender the balance of the purchase price when no objection was made to the medium of tender.—Moulton v. Kolodzik, Minn., 107 N. W. Rep. 154.

170. WATERS AND WATER COURSES—Pollution.—A lower riparian owner is entitled to protection by injunction from the pollution of the stream which prevents his reasonable use of it in the absence of special equities or qualifying circumstances which take the case out of the general rule.—Thropp v. Harpers Ferry Paper Co., U. S. C. C. of App., Fourth Circuit, 142 Fed. Rep. 690.

171. WILLS—Annuities.—Where testator devised to his wife the use of certain rooms in the homestead, with proper support and care to be furnished by her son, with a provision for an annuity in lieu of the care at her election, and she did so elect, she then had the right to a cook stove and other essentials for the preparation of her meals, and where the son refused to furnish them it was an eviction, authorizing a recovery by the mother from her son of the value of the use of the rooms.—Begin v. Begin, Minn., 107 N. W. Rep. 149.

172. WILLS—Intention of Testator.—The fact that the testator was illiterate and that his will was written by one not learned in the law held not to take the case out of the rule that the court must ascertain the intention of the testator from the language used.—Freeman v. Freeman, N. Car., 53 S. E. Rep. 620.

173. WITNESSES—Competency of Contradictory Evidence.—A deed is not competent evidence to contradict the testimony of a witness that he purchased the property conveyed some years prior to its date, being entirely consistent with an earlier purchase.—Roessler-Hasslacher Chemical Co. v. Doyle, U. S. C. C. of App., Third Circuit, 142 Fed. Rep. 118.

174. WORK AND LABOR—Value of Services.—In an action for work and labor by plaintiff as a minor, evidence that ordinary miners' wages were $3 per day held admissible.—Corcoran v. Halloran, S. Dak., 107 N. W. Rep. 210.